Supreme Court, U.S.
FILED

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No.

In The

Supreme Court of the United States

Cindy R. Leonard

Petitioner

v.

Porter J. Goss, Director
Central Intelligence Agency
et. Al

Respondents

On Petition For Writ Of Certiorari
United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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May the Central Intelligence Agency ignore the patterned aspect of allegations and define the wording of the issues related to claims of harassment under Title VII, claims of retaliation for participating in processes related to Title VII claims, and of claims of a hostile work environment in a piece meal fashion.

May post removal evidence be considered in reviewing a charge of medical incapacity.

May agency refusal to pursue a claim of harassment be construed to assert that a complainant did not exhaust all of her administrative remedies.

May attorneys defending an Agency accept service for a contract employee, then later allege that the contract employee was not served.

May Agency medical personal in their official capacities threaten an employee with a termination of employment for refusal to accept medical advice calculated to adversely affect the employee's health and quality of life or that is calculated to lead to death or serious disability for pursuing a complaint in or outside the workplace.

Given the criminal sanctions that can be imposed for revealing the names of covert operational assets and the increasing use of non government employee informants, how can a CIA employee involved in civil suit where an unwitting person or a non CIA affiliate needs to be served, serve that unwitting person without getting

sanctioned administratively and or criminally for revealing either the employee who is bringing suit's CIA affiliation or any other CIA employee's CIA affiliation.

Should the security clearance process be subject to judicial oversight and relief.

Parties To Proceeding

Cindy R. Leonard
Porter J. Goss, Director, Central Intelligence Agency
Heidi F.
William F.
Douglas B.
Marilee J. Layman
Herbert Briick
Ronald L.
Diane E. Florkowski
William Crumb
Susan Waterman
Jeanette Moore
Gary C.
Shirley S.
Lynda M.
The United States of America

Corporate Disclosure Statement

To my knowledge, there is no parent or publicly held company owning 10% or more of the corporation's stock.

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CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS AND ORDERS ENTERED IN THE CASE

The opinion of the decision of the United States Court of Appeals for the Fourth Circuit for rehearing is unpublished and appears at Appendix A to the Petition.

The decision of the United States Court of Appeals for the Fourth Circuit unpublished and appears at Appendix B to the Petition.

The decision of the Federal District Court is unpublished and appears at Appendix C to this Petition.

The decision of the Federal District Court on the motion for Default Judgment regarding William Crumb appears at Appendix D to this Petition and is unpublished.

STATEMENT OF THE BASIS FOR JURISDICTIONS

The United States Court of Appeals for the Fourth Circuit affirmed the District Court's opinion in a decision reached on 20 December 2004. A timely petition for rehearing and rehearing en banc was denied by the United States Court of Appeals for the Fourth Circuit on 12 July 2005 and a copy of the order denying rehearing appears at Appendix A of this petition. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ETC

Selected Provisions of the United States Constitution

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Gran Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and or the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Selected Federal Statutes

Section 703(a)(1) Civil Rights Act 42 U.S. C. 2000e. It shall be an unlawful employment practice for an employer

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

The full text of applicable act is included in Appendix G of this document.

Health Insurance Portability and Protection Act. "...SEC. 1171"(4) HEALTH INFORMATION.--The term 'health information' means any information, whether oral or recorded in any form or medium, that--

"(A) is created or received by a health care provider, health plan, public health authority, employer, life insurer, school or university, or health care clearinghouse; and

"(B) relates to the past, present, or future physical or mental health or condition of an individual, the provision of health care to an individual, or the past, present, or future payment for the provision of health care to an individual"... The full text of applicable law is included in Appendix F of this document.

STATEMENT OF THE CASE

BACKGROUND

In 1989 Petitioner began employment with CIA, she received two monetary awards totaling $2500 between 1989 and 1995 for exceptional duties as a line supervisor and for writing and editing an internal newsletter that noticeably raised the morale of her unit so much that it was implemented across the entire group indicating her positive interpersonal, management, writing, and communication skills. In 1995 after completing the career training program, she was selected and entered the polygraph training class along with approximately 25 other students at least 18 of whom were CIA employees.

Shortly after entering the polygraph class, Petitioner noticed that she was treated differently from her classmates, one classmate asked her what classified information she had disclosed indicating that the different treatment was be due to results of her last polygraph session and effectively placing Petitioner on notice. Another employee informed her that a male white classmate, Douglas B. was reviewing her security file. No classmate had any reason to review anyone assigned to the polygraph class's security file. Douglas B. also began to make negative racial and gender related comments routinely stating that the polygraph class had the most blacks ever assigned to one polygraph class, that the quality of the polygraph class was lowered because

qualified male white employees were excluded to allow unqualified black males and females in the class. He once told a white female to hit Petitioner in response to Petitioner requesting that the female white not adjust the air as prior to the female white entering the room, all had agreed to turn the thermostat up because it was too cold. Douglas B. also routinely alleged that he was a victim of discrimination because he was a white male and that he was tired of having to cater to blacks and females. Douglas B. also alleged that he was not promoted and selected as the manager of his prior unit because he was a white male, but that a female black allegedly with less experience was selected as a manager and promoted to GS 14 simply because she was a black female. On one occasion while reviewing an applicant's case prior to her being administered her pre-employment polygraph testing, in regards to the Applicant, Douglas B. stated "she's black, female, from Detroit, you know she used [uses] drugs," thereby indicating some of his biased, misplaced, stereotypical, preconceived notions about the behavior of black females. The applicant was not accepted for employment as a result of polygraph testing related to the questions of drug usage. Given the influence that an examiner has over a polygraph test, and his history of documented interpersonal conflicts in general and minorities in particular (part of the reason that he was not promoted to manager of his prior assignment), he should have been removed from the polygraph environment, however he was not. However, William F. stood so close to Petitioner that she could feel the heat from his belly as he yelled at Petitioner to leave based on

false, uninvestigated, or unsupported allegations of racial bias by Douglas B. and Marilee J. Layman that came from a federal investigator who had racial bias cases alleged against him when he was a local law enforcement officer.

In September 1995 in response to a reduction in funding imposed on the Central Intelligence Agency (CIA) by Congress due to the Aldrich Ames spy case, CIA management elected to not only reduce the workforce population but to protect white males particularly those in the Directorate of Operations by utilizing the security process and all CIA polygraph personnel were informed of the decision. Thus a discriminatory reason for applying the security process was established in violation of Section 703 (a)(1) of the Civil Rights Act of 1964, 42 U.S. C. 2000e-2(a)[1] and polygraph personnel and management were aware that any nonwhite male placed in the counterintelligence process would most likely be terminated from employment with the CIA, a material fact that the lower courts were not made aware. Polygraph management and polygraph personnel who previously worked for or in support of the adjudication and liaison offices were aware of the process, the criteria for selection for investigation, and the fact that by design

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[1] Section 703(a)(1) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a)(1) provides that "It shall be an unlawful employment practice for an employer... to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin..."

anyone placed in that process would not emerge unscathed. In anticipation that unsuspecting employees would file complaints of mistreatment with the Investigator General (IG) a Personnel Assessment Center (PAC) was established which included members of various groups within CIA such as the Office of Investigator General (IG), the CIA Office of Equal Employment Opportunity (OEEO), the Office of Medical Services (OMS), Human Resources, and others another material fact for which the lower courts were not made aware. Regulations regarding the PAC's inception, purpose, members, duties, its disbandment, and its successor organization were not released in discovery as Petitioner requested [were withheld].

Circa September 1997 or 1998 the goals of the CIA had been accomplished and an Employee Bulletin was circulated to all employees stating that the financial impact and stress placed on employees and their families was too much of a penalty for those employees who had their promotions placed in escrow due to counterintelligence or employment reinvestigations thus the practice would no longer occur. Another material fact that the lower courts were not made aware of and relevant discoverable documents that could and should have been provided especially given that documents concerning the PAC had previously been released in other proceedings.

In 1995, Douglas B., whose position prior to entering the polygraph class was acting supervisor in a liaison group, informed Petitioner that he was trying to get a class action

suit based on age, race, and gender started, that he would sue in three years, and he attempted to recruit Petitioner into this class action suit against the office of security to which Petitioner declined to join. From the point that Petitioner declined to join the suit Douglas B., a polygraph employee whose prior assignment was acting manager in a liaison office, and who had reviewed Petitioner's security file, began a campaign targeting Petitioner by making false allegations of racial misconduct and by his own admission attempting to irritate Petitioner by petty acts such as rattling candy papers during lectures while sitting next to Petitioner.

Once the class graduated and began polygraph examiner duties, Douglas B. complained still alleging a racial bias on the part of Petitioner until Petitioner was reassigned from the Industrial branch which conducted industry examinations, administered the least amount of questions, and had the least number of tests with a relaxed time line for completing the testing and reports, to the Applicant Branch where tests consisted of the most questions, required strict time lines for completion of tests and reports, and tested the population for which the most test were conducted.

From September 1995 until September 1998, Douglas B. continued his harassment of Petitioner by monitoring her examinations when he was given weeks off from testing because of his allegations of being too stressed to test, making derogatory comments about Petitioner's testing techniques to quality control officers, supervisors, and in

the examiner comments section of polygraph technical comments attached to the actual polygraph reports even though he was not a supervisor, was not acting in a supervisory capacity, and did not have a very successful resolution rate of polygraph testing.

Even though Douglas B. was not and had never been an investigator, Douglas B. monitored Petitioner during her non testing time and was observed by Petitioner on several occasions rifling through her fastened tote bag and other personal effects. Petitioner was even denied a career enhancing temporary duty assignment because Douglas B. stated that he did not want to go if Petitioner went. Douglas B. was never medically evaluated because of his admission of too much stress to conduct a polygraph test, he was never reassigned from the polygraph division, after three years assigned to a group of Examiners that conducted the easiest test cases, the Industrial Branch, Douglas B. was finally reassigned to the employee branch where he promptly began complaining that he was being treated differently because of his race, that he was too stressed to conduct polygraph test and began alleging that Petitioner did not talk to him until he was finally given his wish to be reassigned to the Industrial Branch. He was never forced to submit to a Fitness For Duty Evaluation, he was never forced to leave the polygraph assignment, and he received his polygraph pay incentive even though he was not testing. Because of Douglas B.'s false allegations of racial bias at a time when Petitioner was placed in the pool of non white males who would be subjected to counterintelligence

investigations and to which Petitioner's management and Douglas B were well aware of Petitioner's precarious situation, Petitioner had to endure the harassment or resign because if she complained to the IG while in the counterintelligence process her employment would be terminated.

Heidi F., Petitioner's line supervisor, at the time, not only failed to take corrective action against Douglas B., but set about to aid him by using his known false complaints and his race based complaints lodged for his own personal gain as justification to lower Petitioner's scores on her performance appraisal rendering her non competitive and non promotable for at least three years. Heidi F., a first time supervisor with no supervisory training, who prior to her assignment to polygraph had never worked in the security or law enforcement arena began to openly assist Douglas B., in his harassment of Petitioner after Heidi F.'s second spouse stopped talking with her to watch Petitioner as Petitioner walked passed Heidi F. and Heidi F.'s second spouse who were engaged in what appeared to be an argument. In the disputed counseling session, Heidi F. first gave as an example of Petitioner's alleged bad attitude, "the way you walk around here," She later compared Petitioner to her spouse acknowledging that he had poor interpersonal skills in his performance appraisal, however both Heidi F and her spouse were in their second marriages and the negative comments in his performance appraisal had to do with his performance in that he towered over a little employee of Asian ethnicity and called the employee a spy berating the man so badly that

the then Head of the Polygraph Office had to go to the employee's home to apologize for the behavior to avoid a serious incident. The employee was not a spy and there was no evidence to support that assertion at the time and Heidi F.'s personal relationship problems should have been kept out of the workplace.

In 1998, Heidi F. attempted to find fodder to get Petitioner fired by polling only white male and white female polygraph employees to obtain derogatory information regarding Petitioner's interpersonal skills in violation of Agency procedures and written guidance, then finding no coworkers other than Douglas B. and the two female white coworkers that supported him in his attempt to get a class action lawsuit, Heidi F. referred Petitioner to the medical department for a fitness for duty evaluation based on the false racially motivated accusations that occurred in 1995 in the polygraph classroom and during a counseling session wherein she attempted to counsel Petitioner for false racially motivated actions that either did not occur, that were taken out of context, or that occurred with or because of her spouses inappropriate actions. In the exhibits in the trial court, and in the appeal to the Appellate court, Petitioner supplied the written sworn statements that the Respondents requested to support her claims that she displayed no racial bias inside or outside the workplace and that she attempted to avoid harm by staying in her place as she was instructed to do by her managers. The fact that one is referred for a Fitness For Duty Evaluation can result in termination of one's employment regardless

of the outcome, thus referral for a fitness for duty evaluation in this case is an adverse action in and of itself. As advertised by the CIA in the Special Issues Handbook that was in affect at the time, referral for a fitness for duty evaluation is the first step toward employment termination.

Heidi F. alleged that Petitioner had conflicts with many coworkers when in reality all of the incidents that Heidi F. cited that actually occurred involved Douglas B or Marilee J. Layman both of which were false racially motivated complaints and Heidi F. knew that at the time, thus neither she nor the respondents can allege that they relied on credible evidence. It was a manipulation of facts to paint Petitioner in an unfavorable light to get her fired stemming from false allegations of racial bias, therefore all actions taken as a result are tainted from that poisonous tree.

Heidi F. referred Petitioner for a Fitness For Duty Evaluation even though one of the female white coworkers did not always attend gatherings or meetings and was frequently found sitting in her darkened examination room with the lights off and the door shut to avoid contact with other employees and another female white examiner upon learning that she did not get promoted to GS-13, used profanity, slammed doors, and yelled so loudly that examiners stepped out of their examination rooms to see what was going on, but neither white female was ever referred for a fitness for duty evaluation nor were either white female's interpersonal or

communication skills ever lowered to prevent her from getting promoted or to get her fired.

When Petitioner requested to leave the polygraph assignment short of tour, her management held her to the tour length. When her tour expired or was nearing expiration, Petitioner applied for a position as a financial investigator, there were several vacancies, however, Petitioner was denied the position even though she met the qualifications and the vacancies were announced two addition times making the selection pool available to apply at successively lower grades until a candidate with less experience and a lower grade than Petitioner was selected. When Petitioner applied for a position as a CIA polygraph instructor at the Department of Defense Polygraph Institute which required two instructors, one position was eliminated and the other job description was written in such a manner that only one white male, Gary C. could apply for it. When Petitioner applied for a position within the Counterintelligence Center, she was not selected due to the unsupported negative comments that Heidi F. placed in Petitioner's performance appraisals, as neither of the other two candidates had any negative comments in those areas, thus the poor performance appraisals submitted by Heidi F. did in fact adversely impact Petitioner's employment. Petitioner was informed that those negative comments were the reason that she was not selected for the position. In addition, a branch manager and a senior manager informed Petitioner that if she did not stop her OEEO pursuits that adverse actions would be taken against her. Petitioner did not

stop her pursuits and adverse actions were taken against her. In addition in a case publicized in the Washington Post on Friday 06 April 2001, following the death of a senior CIA analyst, Rich Yannuzzi, a female white employee was promoted and given monetary awards even though she allegedly choked another employee. Even though this was an action calculated to produce serious bodily harm or death and was clearly a demonstration of a significant failure to resolve workplace differences in an appropriate manner, not only was the female white not fired for this behavior but she was promoted and monetarily rewarded. In addition, when her privacy was violated, an IG investigation was conducted which caused Yannuzzi to commit suicide, however nothing was done to the white males who violated Petitioner's privacy. Heidi F. had three high achieving female black examiners on her team. After alleging all had [poor] interpersonal skills, enforcing the writing and other standards more stringently towards the three female blacks on her team, all three were reassigned to the less prestigious applicant branch. One resigned due to the harassment when her performance scores were being lowered, and Petitioner filed a formal complaint and suit and was discharged.

Respondents allege that race had nothing to do with the adverse actions taken against Petitioner, however the female white in the above cited case was rewarded not fired for criminal acts and poor interpersonal skills while the Petitioner's performance scores were lowered and her employment terminated. As in Desert Palace , Inc v. Costa, No. 02-679, U.S. Supreme Court (June 9, 2003),

Petitioner alleged race and gender discrimination, the Respondents' allege another motive, however the punishments for the female white with uncontested poor interpersonal skills and mental instability was significantly different from Petitioner's disputed poor interpersonal skills and mental stability. This court held that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor." Common sense would dictate that a more stringent punishment would be inflicted on an employee who tried to kill another employee rather than one who alleged employment discrimination or even if the court would believe the Respondents' proffered reasons for the stance taken against Petitioner, Petitioner was still treated differently than the white females similarly situated.

Because of the secretive nature of the CIA and fear of prosecution for violations related to her secrecy agreement as well as the fact that Petitioner was placed on administrative leave and submitted for a fitness for duty examination within minutes of being told by one of her senior managers that the Agency had become aware of her suit and that an Office of Medical Services CIA Psychologist who was also a member of the board that determined employee suitability wanted to speak with Petitioner about the comments that she wrote in her Court Pleadings associated with the suit thereby separating her from the data that she possessed in her office and in her CIA email account, Petitioner was unable to produce the required or requested documentation and as a result had to

rely on circumstantial evidence as the CIA refused to participate in discovery from the initial administrative process throughout the administrative and judicial processes save for the redacted version of the Report of Investigation and instead alternative motives were offered by the defendants for the ill treatment that Petitioner suffered, thus per the decision in Desert Palace, Inc. dba Caesar's Palace Hotel & Casino v Catherine Costa this Court held that direct evidence was not required, however the lower courts elected to disregard this decision and appeared to support the Respondents' assertion written in the final motion for summary judgment that the lower courts were not the Supreme Court as if the decisions reached by the Supreme Court were not binding on the lower courts.[2] Petitioner provided several sworn and unsworn statements from coworkers and neighbors proving that the allegations made by Heidi F., William F., and Marilee J. Layman were [false].

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[2] In Swierkiewiz v. Sorena N.A., 122 S. Ct. 992, this Court held that if an employee files a complaint against an employer for employment discrimination, as long as the McDonnell Douglas four-part test was met the employee had provided enough for the complaint to proceed; no specific facts to prove the discrimination needed to be provided in the complaint. Petitioner met all four parts in that she is a black therefore a member of a protected class, she was qualified for the job of polygrapher and the subsequent jobs for which she applied and denied based on racial and gender based negative comments of Douglas B., Marilee J. Layman, Heidi F., William F.; and others; adverse employment actions were taken i.e. denial of training, denial of promotions, denial of jobs, fitness for duty evaluations, and eventually termination of employment.

Dr. Susan Waterman, a CIA psychiatrist, who reviewed Petitioner's medical records[3], was aware that Petitioner had a family history of diabetes, one of the top five reasons for reported deaths in the USA, and who also knew that in addition to weight gain, that one of the side effects of Zyprexa is to bring about the early onset of diabetes in those predisposed to diabetes, yet she required that Petitioner be given Zyprexa and required that Petitioner take the prescribed medication or Waterman would recommend that Petitioner be declared unfit for duty. It should also be noted that Marilee J. Layman, a federal employee also listed [as] a defendant who also made false racial allegations against Petitioner is grotesquely obese and that Waterman alleged that Petitioner was blaming the neighbor (Layman) for things that the Agency was doing. Thus by placing Petitioner on Zyprexa, Waterman caused Petitioner to gain excessive body fat, adversely impacted Petitioner's quality of life and perhaps Petitioner's actual life expectancy as Petitioner has since been diagnosed as Pre-diabetic. Some medical professionals suggest that one is either

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[3] Under [HIPAA, the Health Information and Portability Protection Act], Respondent avoided releasing the medical information regarding a manager who himself was medically evaluated after he allegedly placed the barrel of gun in his mouth when he believed that he was going to be fired for discharging a weapon, yet he was allowed to make judgments regarding Petitioner's mental condition when he had no medical training and obvious mental issues if he placed a gun in his mouth. However under [HIPAA], Respondent's denied Petitioner's request for his medical records which also cited his poor interpersonal skills.

diabetic or not diabetic and that pre-diabetes is only early stage diabetes. Therefore, Petitioner may have in fact been given a life sentence, for a non-capital offense and without benefit of trial or due process of law.

Tne Courts erred when it released the United States from the suit as Petitioner exhausted all of her administrative remedies when the CIA refused to proceed on her formal IG complaint alleging that no formal complaint was made although Petitioner completed and submitted the formal complaint and per CIA regulations, the IG reviewed and caused to be redacted Petitioner's complaint to congress notifying the then Director of Central Intelligence, George J. Tenet, of pertinent complaints resulting in two new Director of Intelligence Directives one relating to sources and methods and one related to disclosures of classified information and use of ongoing cases as examples in classes which were then used as a basis to deny Petitioner's discovery requests.

Because the EEOC has a record of all of the complaints and allegations that Petitioner has made and the piecemeal fashion in which the Respondents' have addressed the Petitioner's complaints as well as the resulting damages to Petitioner's cases due to the Respondents' failure to respond to discovery requests or to conduct appropriate investigations, the EEOC denied the Respondents' request for reconsideration in Petitioner's last EEO Complaint (Appendix E). To date the Respondents's have not complied with the EEOC's Order originally filed in October 2004.

As an alleged independent unbiased investigator, William Crumb although a contract employee was supposed to conduct a complete unbiased investigation which should have included interviewing all witnesses who had relevant information, however Crumb did not interview even one witness with relevant knowledge as suggested by the Petitioner. He did not include relevant information regarding the polygraph training, did not talk to witnesses who overhead Heidi F. telling the scheduler what cases to assign Petitioner even though Petitioner was transferred from Heidi F.'s team and the Branch where Heidi F. worked. He never included the emails that allegedly caused Meghan Deese, so much concern that she took the document to the medical department. Crumb neglected his duties and as such should be held accountable for the shoddy investigation. The only address that Petitioner had for William Crumb was his office at the CIA Headquarters, thus service was made there. CIA has a policy that only members of the Office of General Counsel can accept service to prevent the Agency from accepting service for someone that it should not, thus service was accepted for William Crumb along with all of the other CIA Defendants. Crumb was paid by CIA, in his capacity as an EEO investigator his connection with CIA was openly identified, however had Crumb's contract changed his relationship with the CIA might not be openly identified and to serve him again would have placed Petitioner in the position of identifying a covert agent or relationship and subject her to criminal prosecution. Given the Government's past attempts to

entrap Petitioner, Petitioner could not afford to serve Crumb again financially or otherwise as Petitioner's employment had been terminated and with a revoked security clearance she could not then and still cannot obtain employment in her chosen field nor for any federal, state, or local government. In addition, given that Crumb was employed by the CIA, had an office, a dedicated telephone number, an Agency email account, in his official capacity was acting as an agent of the CIA, and was subject to the same workplace rules, regulations, and conditions of employment as any non contract CIA employee he should have been considered an employee as far as these processes are concern[ed] and therefore was properly served at his place of business as were all other CIA employees to include Marilee J. Layman if she was an employee at the time.

Because it was not known whether Marilee J. Layman was witting of the CIA employment of the investigator(s) who interviewed her Petitioner did not want to get prosecuted for revealing the identity of any covert employees, thus Layman was not served as this was a novel process, Petitioner did not [know] how to proceed in this process and sought the Court's guidance on when Layman could be served. If Layman is or was a CIA employee, she was witting of any CIA investigators affiliation. However, no investigator for any government Agency should have revealed Petitioner's CIA affiliation to Layman or any of Petitioner's family members. No disciplinary action was taken against any investigator who revealed same.

For months Petitioner had to listen to her white coworkers allege that they were on cell block H whenever she passed by and after an incident with Eileen R. a female white coworker who supported Douglas B. in his grievance pursuits, Eileen R., began bumping into Petitioner and failed to extend a simple apology or acknowledge that she had bumped into Petitioner even though she had been counseled in the Polygraph Class about touching and making unwanted body contact with persons who may not like such contact. Petitioner complained to her manager Gary C. who requested that Petitioner send him an email regarding the incident. Eileen R. then became loud and stopped into every white examiner's room telling them her version of the incidents so that Petitioner was shunned by her white coworkers promoting the Cell Block H comments. Eileen R. was not counseled or reprimanded, her statements were taken as the truth, no one reminded her that she was counseled about such unwanted contact in the polygraph school, no [one] alleged that she did not extend the normal courtesies that one would expect, no one held it against her nor her reaction to the complaint and she was allowed to the EEO and the IG and to file a complaint that Petitioner made a false complaint against her whereas, Petitioner's complaint was treated as false complaint, her alleged response to a false allegation was labeled as improper, she was given a reprimand, and submitted for a fitness for duty evaluation. In Burlington Northern Industries v. Ellereth, this Court held that an employer is liable for the actionable discrimination caused by a supervisor. Given the backdrop of the

downsizing effort targeting non white males, Heidi F., William F., and Jeanette Moore's conduct (successively higher management), Respondents are liable for the discriminatory treatment of Petitioner.

The conduct of Petitioner's management and coworkers was severe in that it resulted in tangible adverse employment actions such denials of training, assignments, promotions and infliction of disciplinary actions for events for which Petitioner's white coworkers were not chastised. The conduct was pervasive in that Petitioner could not leave her small little room without Heidi F. alleging that she did not know where Petitioner was, Petitioner could not have a conversation with another employee without Heidi F. inquiring in regards to what they argued about. Many of Petitioners white coworkers shunned her daily and referred to the hallway they shared as Cell Block H, and the comments were passed to CIA employees in other offices such as adjudicators who make the initial recommendation for retention of security clearances and therefore employment and to investigators one of whom was Ronald L. who enlisted the aid of Marilee J. Layman and other neighbors in making false racially biased statements regarding Petitioner's demeanor and actions in Petitioners home and in homeowner association meetings. Thus not only was Petitioner's work environment hostile, but so was her home environment making the home and work area so objectively offensive that Petitioner suffered gastro-intestinal disorders and migraine headaches.

The Lower Courts did not address Petitioner's claims of termination of employment as an adverse action, however as in Clockedile v. New Hampshire Department of Corrections, F. 3d- (2001 WL 293201, 1st Cir.; 2001) the lower Court stated that Retaliation claims are preserved so long as the retaliation arises from the original matter complained of to the EEOC.

In Hollins v. Atlantic Co.; F. 3d (1999 WL615487, 6th Cir.) and Stalter v. Wal-Mart Stores, Inc, 195 F. 3d 285 (7th Cir., 1999) the Courts found that enforcement of policy may be discriminatory either as pretext or to establish a prima facie Case of disparate treatment, Heidi F. only applied stricter standards to the black females assigned to her team. For example, Heidi F. counseled Petitioner about taking sick leave that Heidi F. pre approved, but she never counseled the white males and white females who took unscheduled annual leave without approval on the work days before or after their regularly scheduled off days which constituted leave abuse. Heidi F. also never said anything to a white male who took sick leave then came into the office to catch up on reports or just socialize with coworkers prior to going to his medical appointment, even though a regulation prohibited being on Agency premises when out on sick leave existed.

In National Railroad Passenger Corp. v. Morgan, 122 S. Ct. 2061 (2002), this court held that discriminatory acts that occur before the 300-day filing requirement of Title VII may be actionable if they are related to acts that

occurred within the 300 day period that are part of a hostile work environment thus William Crumb should have investigated all of Petitioner's complaints and not merely allege that the events were background material that was never mentioned in the investigation except by Petitioner.

In Lipphardt v. Durango Steakhouse of Brandon, Inc., 2001 WL 1149051 (11th Cir., 2001, the Court held that to recover for retaliation under Title VII, a fired employee is not required to prove that a coworker's conduct legally constituted (sexual) harassment, but only a good faith, reasonable belief that she was the victim of (sexual) harassment that led her to report the coworker's conduct to management and therefore the issue of retaliatory discharge was one for the jury to decided, thus Petitioner should have had the opportunity for a jury to decide the outcome of her case.

REASONS FOR GRANTING THE WRIT

The Fifth Amendment to the United States Constitution has an explicit requirement that the Federal Government not deprive individuals of life, liberty, or property without due process of law and it also guarantees that each person is to receive equal protection under the laws. Thus every federal employee who made a false statement should be subjected to the same punishments that were inflicted on Petitioner for allegedly making false statements and in the events wherein white female and white males engaged in the same kinds of activities that Petitioner is alleged to

have participated in, Petitioner should have received the same protections and the same benefits. The due process clause of the 14th amendment requires that employees have a fair procedural process before adverse actions are taken.

Petitioner was not given due process or equal protection prior to adverse actions being taken in relation to nor as a result of the complaints related this action. Petitioner stated at the time of the review of her performance appraisals and the discussions were witnessed by two neutral observers who saw the documentation that Petitioner presented. The documentation was polygraph reports, charts, rules and policies and procedures that were in place at the time the rating periods in question occurred, all of which the Respondents refuse to admit into evidence. During the review process, (noted by the reviewer), Petitioner stated that the discussion was just to say that due process was given, but the process was a sham as the outcome was predetermined before the session began. The same or similar comments were made by Petitioner in the Depositions. Unless the Respondents are forced to participate in discovery or admit to the truth, the only way to obtain the truth is by a trial where witnesses may be examined and cross examined. By refusing to force the Respondents to participate in discovery and either release, redact, admit to, or place sensitive documents under seal, the Respondents and the lowers courts denied Petitioner equal protection and violated the due process clause of the 14th amendment by not providing the Petitioner equal protection under the

law when Respondents failed to comply with discovery requests in good faith and the courts failed to require compliance instead accepting the word of Assistant U.S. Attorney Richard Parker who stated that all discovery requests had been addressed.

When Petitioner was still employed and had access to all of the supporting data she provided the actual documentation to support her claims, her management was forced to admit that her assertions were true and agreed to settle in Petitioner's favor as stated in the counseling report included in the Report of Investigation. However, once Petitioner's original cleared attorney was given a job with the Government and Petitioner was without benefit of counsel, the Respondents reneged on their written agreement and began to take adverse actions against Petitioner.

In light of the unprecedented unchecked powers given the Federal, State, and Local Governments since September 11th 2001, the liberties given and that are contemplated to be given to management within the Government for employment decisions, the resulting weakening of employee protections, and the tendency for the employment processes to end in violence, this case has great significance to the millions of Federal, State, and Local Government Employees and the businesses, professionals, neighbors and family members that may be required or unwittingly made to assist in the employee removal efforts

In short, Petitioner was denied career enhancing training, assignments, promotions, and was unfairly labeled as having interpersonal problems, subjected to numerous investigations, medically evaluated multiple times, unfairly labeled as racially biased and as having a bias against the disabled based on racial biases of coworkers, investigators, managers, and a neighbor and adverse actions were taken based on those biases. The conduct was pervasive, and severe, and resulted in tangible employment actions. Complaints from 1995 until, for relief fell on deaf ears and management either aided the discriminators or hindered the investigation by denying Petitioner time off to discuss her concerns with an Equal Employment Opportunity Representative, instructing witness to remain silent, and fragmenting claims to avoid investigation of hostile environment claims, thus the case should be remanded for trial or judgment for the Petitioner as a matter of Law. In addition, given the fact that the security process was used in a discriminatory manner and in retaliation for Petitioner filing her suit and given the fading employee rights in a government that is supposed to be representative of all of the people, the no personal accountability, and the unchecked powers of government to destroy lives and careers by hiding behind an IG investigation or claiming national security protections, the issue of whether the security process should be subject to judicial oversight should again be addressed as there is no other mechanism to ensure personal and professional accountability or t[o] address the lack there of. Therefore, Certiorari should be granted.

APPENDIX A
Decision on Motion for Rehearing
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Filed
July 12, 2005

No. 04-2125
CA-03-1176-1

Cindy R. Leonard
Plaintiff-Appellant

v.

Porter J. Goss, Director, Central Intelligence Agency; Heidi F.; William F.; Douglas B.; Marilee J. Layman; Herbert B.; Ronald L.; Diane E. Florkowski; William Crumb; Susan Waterman; Jeanette Moore; Gary C.; Shirley S.; Lynda M.; United States of America

Defendants-Appellees

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc and motion to stay the mandate was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and As the

panel considered the petition for rehearing and is of the petition that it should be denied, IT IS ORDERED that the petition for rehearing and rehearing en banc and motion to stay the mandate is denied. Entered for a panel composed of Judge Michael, Judge King, and Judge Shedd.

For the Court,

/s/ Patricia S. Conner, Clerk

Appendix B
Decision of the Federal Appeals Court

UNPUBLISHED

UNITED STATES COURT OF APEALS
FOR THE FOURTH CIRCUIT

NO. 04-2125

CINDY R. LEONARD

Plaintiff – Appellant,

Versus

PORTER J. GOSS, DIRECTOR, CENTRAL INTELLIGENCE AGENCY; HEIDI F.; WILLIAM F.; DOUGLAS B.; MARILEE J. LAYMAN; HERBERT B.; RONALD L.; DIANE E. FLORKOWSKI; WILLIAM CRUMB; SUSAN WATERMAN; JEANETTE MOORE; GARY C.; SHIRLEY S.; LYNDA M.; UNITED STATES OF AMERICA.

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. James C. Cacheris, Senior District Judge. (CA-03-1176-1)

Submitted: December 16, 2004 Decided: December 20, 2004

Before Michael, King, and Shedd, Circuit Judges.

Affirmed by unpublished per curiam opinion

Cindy R. Leonard, Appellant Pro Se. Leslie Bonner McClendon, OFFICE OF THE UNITED STATES ATTORNEY, William Joseph Howard, Ralph Andrew Price, Jr., Assistant United States Attorneys, Alexandria, Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(e).

PER CURIAM:

Cindy R. Leonard appeals the district court's order granting summary judgment in favor of her former employer in her employment discrimination action. We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. See Leonard v. Tenet, No. CA-03-1176-1 (E.D. Va June 30, 2004). We dispense with oral argument because the facts and legal contentions are

adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

Appendix C
Decision of the Federal District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

CINDY R. LEONARD,
Plaintiff

v. Civil No. 1:03cv1176

GEORGE J. TENET, ET AL.;
Defendants.

ORDER

For the reasons stated in the accompanying Memorandum of Opinion, it is hereby ORDERED that:

(1) Defendant's Motion to Dismiss or, in the Alternative, for Summary Judgment for is GRANTED;
(2) Should Plaintiff wish to appeal, she shall file her notice of appeal within sixty (60) days of the date of entry of this Order; and
(3) The Clerk of the Court shall forward copies of this Order to all counsel of record and Plaintiff pro se.

June 30, 2004
Alexandria, Virginia
/s/ James C. Cacheris
United States District Court Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

CINDY R. LEONARD
PLAINTIFF
V
GEORGE J. TENET, ET AL.'
DEFENDANTS.

CIVIL No 1:03cv1176

MEMORANDUM OF OPINION

This matter is before the Court on Defendant Tenet's Motion to Dismiss or, in the Alternative, for Summary Judgment. For reasons stated below, the Court will enter summary judgment in favor of the Defendant.

I. Background

This is an employment discrimination action by a federal employee alleging a continuing pattern of discriminatory conduct against her because of her race and gender. It seeks compensatory and injunctive relief, and is brought under 42 U.S.C. 2000e-5(g), 2000e-16, and for

declaratory relief under 28 U.S.C 2201 based on the discriminatory and retaliatory employment practices of the CIA towards Plaintiff, Cindy R. Leonard (aka Helen A. Montgomery).

Leonard is an African-American female, who at all times relevant to this Complaint was an employee of the CIA in its polygraph unit. Plaintiff began her career with the Agency in 1989 as a Security Protective Officer. In 1995, she began working as polygraph examiner in the CIA's Polygraph Division. During this time, according to Leonard, the Defendant "maintained, acquiesced in the maintaining, or failed to take appropriate required action to eliminate a general consistent pattern of and practice of racial and [sic] discrimination" by her co-workers and managers. (Compl. 4.2) She alleges at least fifty incidents that she believes were motivated by racial and gender bias. (Id. 4.4-62.) Her allegations focus primarily upon the actions of a co-worker, Douglas B, and three supervisors, Gary C., William F., and Heidi F.[4]

Plaintiff claims that her workplace became hostile beginning when she joined the polygraph unit. She attended an in-house training program with approximately 17 other students. (Compl 4.3-4.13) During the training sessions, Douglas B made a number of comments that were offensive to Leonard. These comments generally

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[4] The parties have presented the names of CIA personnel in this manner, because these employees are not publicly affiliated with the CIA.

focused on Douglas B's perception that African-American employees were receiving preferential treatment during the training. (Id 4.4-9) The course ended in September 1995.

During the period of September to December 1997, Gary C. Leonard's team leader, allegedly made repeated comments about masturbating in front of a mirror to Plaintiff, despite her objections to these comments (Id 4.17) Gary C. then treated her rudely, accused her of missing a team meeting; he refused to review the agenda of the meeting with her. (Id. 4.47)

Leonard claims that William F., who at all times relevant to the Complaint was a supervisor in the Polygraph Division, falsely accused her of engaging in misconduct. (Id. 37) On two occasions, Leonard claims William F threatened to have her removed from the CIA campus (Id. 4.39)

Plaintiff complains of a draft and final performance evaluations given to her by Heidi F. (Def. Ex. 1 at 25-26, Ex 2 at 2-3) The performance reviews gave Leonard negative reviews for her poor interpersonal skills. After Plaintiff objected to the draft report (Def. Ex. 3) Heidi F. submitted her response. (Def. Ex. 4). On December 14, 1999, Jerry F., Heidi's supervisor and the PAR reviewing official, sustained Heidi F.'s evaluation (Def. Ex. 5.)

In 1999, Plaintiff raised allegations of workplace discrimination with the EEO office at the CIA. In May

2000, Plaintiff sent emails to Meghan Deese, the Chief of Counseling and Investigation of the EEO office, claiming that her supervisors were recording and video taping her by using special "earrings" and "special rings." (Def. Ex. 8) Deese contacted the Mental Health Branch of the Agency's Office of Medical Services. Deese referred the case to the mental health department, because of her concerns over the unusual nature of the emails. Plaintiff contends that it was in retaliation for her filing of a claim.

The Court understands the Complaint to allege three types of discrimination: (1) Defendant engaged in disparate treatment of the Plaintiff insofar as she was denied development training, given discriminatory and false performance reviews, and assigned a disproportionate amount of difficult work; (2) Defendant subjected Plaintiff to a hostile work environment from April 1995 through November 1999; and (3) Defendant retaliated against Plaintiff for her filing of her Equal Employment Opportunity Complaint.

II. Standard of Review

A Rule 12(b)(6) motion to dismiss tests the legal sufficiency of the complaint. See Randall v. United States, 30 F.3d 518, 522 (4th Cir, 1994). It should be denied unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," De Sole v. United States, 947 F. 2d 1169, 1177 (4th Cir. 1991) (citations omitted); see also Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

Where "matters outside the pleading are present to and not excluded by the court," motion may be converted to a motion for summary judgment. Fed. R. Civ. P. 12(b) In such and instance, the court is required to give all parties "reasonable opportunity to present all material made pertinent to such motion by Rule 56." Fed. R. Civ. P. 12(b); see also Plante v. Shivar, 540 F.2d 1233, 1235 (4th Cir. 1976). According to the Fourth Circuit, " 'reasonable opportunity' includes 'some indication by the court to a "all parties" that it is treating the 12 (b)(6) motion as a motion for summary judgment,' with the consequent right in the opposing party to file counter affidavits or to pursue reasonable discovery." Plante, 540 F.2d at 1235 (quoting Johnson v. RAC Corp., 491 F.2d 510, 513 (4th Cir. 1974).

Although the Defendant's motion is styled as both a motion to dismiss and a motion for summary judgment, the Court will only consider it as a motion for summary judgment. Both parties have conducted discovery and submitted evidence in support of their positions. The parties will not be prejudiced by the conversion, as they have had reasonable opportunity to present all pertinent material.

Summary judgment is appropriate only if the record show that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law" See Fed. R. Civ. P. 56 (c). The party seeking summary judgment has the initial burden to show the absence of a material fact. Cleotex Corp. v. Catrett, 477 U.S. 317, 325. A genuine issue of material fact exists "if

the evidence is such that a reasonable jury could return a verdict for the non-moving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

Once a motion for summary judgment is properly made and supported, the opposing party has the burden of showing that a genuine dispute exists. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 745 U.S. 574, 586-87 (1986). The party opposing summary judgment may not rest upon mere allegations or denials; a "mere scintilla" of evidence is insufficient to overcome summary judgment. Anderson, 477 U.S. at 248-52. A genuine issue exists when there is sufficient evidence on which a reasonable jury could return a verdict in favor of the nonmoving party. See id at 255. Unsupported speculation is not enough to withstand a motion for summary judgment. See Ash v. United Parcel Service., Inc., 800 F. 2d 409, 411-12 (4th Cir. 1986). Summary Judgment is appropriate when, after discovery, a party has failed to make a "showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322 (1986). When a motion for summary judgment is made, the evidence presented must always be construed in the light most favorable to the nonmoving party. See Smith v. Virginia Commonwealth Univ., 84 F. 3d 672, 675 (4th Cir. 1996) (en banc).

When pro se litigants are involved in a matter, courts are presented with a "special dilemma." Beaudett v. City of Hampton, 775 F. 2d 1274, 1277 (4th Cir. 1985). In

particular, pro se claims often present courts with obscure or extravagant claims defying the most concerted efforts to unravel them." Id. Nevertheless, the Fourth Circuit has recognized an "indisputable desire that those litigants with meritorious claims should not be tripped up in court on technical niceties." Id. At 1277-78 (citing Gordon v. Leeke, 574 F. 2d 1147 (4th Cir. 1978)). Despite, the Fourth Circuit's general observation that pro se complaints should be read liberally, it has also stated that there is an outer limit to liberal construction that "does not require those courts to conjure up questions never squarely presented to them." Id. At 1278.

III. Analysis

A. McDonnoll Douglas Analysis

Title VII of the Civil Rights Act of 1964 makes it unlawful for any employer "to discriminate against any individual with respect the [her] compensation, terms, conditions, or privileges of employment, because of such individual's ...sex." 42 U.S.C. 2000e-2(a)(1). See Ochelree v. Scollon Productions, Inc. 335 F.3d 325, 331 (4th Cir. 2003). One manner in which a Plaintiff may demonstrate discriminatory intent is through direct evidence, such as an employer admitting that race was a determining factor in its decision. Moore v. City of Charlotte, 754 F.2d 1100, 1105 (4th Cir. 1985). Lacking direct evidence, a plaintiff may prove discriminatory intent through circumstantial evidence. Whitaker v. Titmus Optical Inc., (E.D. Va 2002) (citing Karpel v. Inova Health Sys. Serv., 134 F.3d 1222, 1227 (4th Cir. 1998).

When considering a motion for summary judgment the district court must follow the Supreme Court's decision in McDonnel Douglas Corp. v. Green, 411 U.S. 792 (1973) and subsequent decisions that have "established an allocation of the burden of production and an order for the presentation of proof in …discriminatory-treatment cases." Reeves v. Sanderson Plumbing Products, Inc, 530 U.S. 133, 142 (2000). First, the plaintiff must establish a prima facie case of discrimination. Id. Once the plaintiff has established a prima facie case, the burden shifts to the defendants to "produc[e] evidence that the plaintiff was rejected or someone else was preferred for a legitimate, nondiscriminatory reason." Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981). After the defendant meets this burden of production, the plaintiff must prove by a preponderance of the evidence that the articulated reason is a pretext for unlawful discrimination. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 507 (1993).

When ruling upon a motion for summary judgment the district court should consider the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered on a motion for judgment as a matter of law. Id. At 148-49.

B. Denial of Training

Leonard claims that the CIA consistently denied her development training.[5] (Compl. 4.14) In particular, she claimed that the Agency denied her application to attend an American Polygraph Association (APA) seminar in Dallas, Texas.[6] (Def. Ex. 1.) To establish a prima facie case of discriminatory denial of training, a plaintiff must show that: (1) the plaintiff is a member of a protected class; (2) the defendant provided training to its employees; (3) the plaintiff was eligible for the training; and (4) the plaintiff was not provided training under circumstances giving rise to an inference of

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[5] Denial of training is a type of discriminatory disparate treatment claim. For the sake of clarity, the Court will consider Plaintiff's denial of training claim separately from her other claims of disparate treatment.

[6] This is the only denial of training that Plaintiff raised in the administrative proceedings. Title VII requires federal employees to exhaust their administrative remedies before bringing an employment discrimination compliant to federal court. See 42 U.S.C. 2000e-16 (c) (2000); 29 C.F.R. 1614.407; see also Brown v. Gen. Serv. Admin.; 425 U.S. 820, 832 (1976); Zografov v. Veterans Admin. Med. Ctr., 779 F. 2d 967, 968-69 (4th Cir. 1985). Moreover, Plaintiff has neither sufficiently pled, nor offered sufficient evidence to withstand summary judgment on any other claims. See Ingram v. Baltimore Gas & Elec. Co.; No Civ. A. CCB-02-2869, 2004 WL 350583, at *8 (D. Md. 2004) (granting summary judgment where plaintiff failed to produce "any specific facts about the kind of training opportunities provided by [defendant], the employees who were eligible to participate, any specific seminars or training opportunities that were denied to [plaintiff], and the specific timeframe when other employees were provided with these opportunities."). Accordingly, the Court will consider only the May3, 1999 denial of training.

discrimination. Thompson v. Potomac Electric Power Co., 312 F. 3d 645, 649-50 (4th Cir. 2002).

Defendant argues that (1) denial of training is not an adverse employment action; (2) Plaintiff has not established that her request was denied under circumstances giving rise to an inference of discrimination; and (3) Leonard's past requests was denied for legitimate non-discriminatory reason.

For the purposes of this motion, the Court will assume that the denial of training is an adverse action. Certainly Thompson indicates that a denial of training can be an adverse employment action. 312 F.3d at 649-50. The other two arguments proffered by the Defendant, however, are dispositive: Leonard has neither produce evidence to support her claim no rebutted the Defendant's legitimate non-discriminatory reason.

In Thompson, the Fourth Circuit affirmed the district court's award of summary judgment to the defendant on a denial of training claim. 312 F. 3d at 549-50. The Court of appeals rejected the plaintiff's claim, because he had received extensive training throughout his employment. Id. At 647 ("[plaintiff] successfully completed more than eighty training courses, thirty two of them between 1996 and 1998"). Moreover, the plaintiff failed to establish hat "similarly situated employees were selected for upgrades on the basis of race." Id. at 650.

In another case, Trammell v. Baltimore Gas & Elec. Co., a Maryland district Court considered a plaintiff's Title VII denial of training claim. 279 F. Supp. 2d 646, 656 (D. Md. 2003). The court held that the plaintiff had failed to establish a prima facie case, because he had not produced evidence that the denial of training was "under circumstances giving rise to an inference of discrimination." Id. Plaintiff failed to establish that he required the training or that he "desired a new position for which those skills were useful." Id. The court rejected the only support for the plaintiff's theory that he was denied this training on the basis of race: the fact that a Caucasian employee received the training. Id. The district court held that this was insufficient, because the Caucasian employee did not occupy the same position as the plaintiff. Id.; se also Ingram v. Baltimore Gas & Elec. Co.' No. Civ. A. CCB-02-2869, 2004 WL 350583, at *8 (D. Md. 2004) ("The simple fact that these employees were provided with specific training opportunities, while an African-American employee working in a different area (and often in a lower-ranking position) was not provided with the same opportunities is not sufficient evidence from which to infer racial discrimination.").

The Court finds these cases to be instructive. It is readily apparent that Leonard has not presented evidence of that her request for training was denied under circumstance giving rise to an inference of discrimination. The Agency's evidence that Leonard received extensive training during her time at the Agency stands uncontroverted. All polygraph examiners must complete

80 hours of approved training every two years. (Def. Ex 6 at 3.) In the Polygraph Division, the Training Review Oversight Committee ("TROC") reviews and must approve all training requests. (Id. at 1.) TROC determined that it would send twelve employees to the APA conference in Dallas, Texas. (Id. at 3.) At the time of the selection, Leonard had accumulated 138[7] hours of training. (Id. at 5.) Like the plaintiff's claim in Thompson, Leonard's allegation that she was denied training is belied by the extensive training she received and the Agency's records of her surplus of training hours. At oral argument, Leonard denied that she had the requisite number of hours; however, this denial without a supporting affidavit or other evidence is insufficient to rebut the Defendant's proffer. See Anderson, 477 U.S. at 248-52 (holding a party opposing summary judgment may not rely on mere denials and allegations).

Secondly, there is no evidence that Leonard needed the training. All of the employees selected for the trip had well below the necessary number of training hours; the employee selected with the highest number of hours had only 38 roll over hours and 13 current hours of training. (See Def. Ex. 6. at 8 indicating the selected employees with a "Y" next to their names and their hours as a fraction- "roll over" hours/current period hours.) Most of the people selected had fewer than ten hours of training

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[7] Leonard had 125 "rollover" hours from the previous two-year period and 13 hours of training during that current two year period. (Def. Ex. At 5.)

for the applicable period. (See id.) According to the TROC, Leonard had by far more hours of training than any other employee in the unit. As in Trammell, Plaintiff has not offered any evidence to support the claim that she needed the training nor rebutted the Agency's showing that she did not require further improvement. See 279 F. Supp. 2d at 656.

Finally, Leonard has not shown that those who were selected for the APA conference were not members of her protected class, i.e. all men or non-African American. In Trammell and Ingram, the district court dismissed the plaintiffs' claims where there was no evidence of discrimination but for the fact that Caucasians received the training instead of the plaintiffs. See Ingram, 2004 WL 350583, at *8; Trammell, 279 F. Supp. 2d at 656. If those cases were dismissed, then a fortiori, the Court must dismiss Plaintiff's claim because Leonard failed to offer evidence that those selected for the training were of a different race or gender.

Even assuming that Leonard did establish a prima facie case, she has not offered any evidence of pretext to rebut the CIA's proffered legitimate, nondiscriminatory reason for her nonselection for training; Leonard was not selected because of her high number of accumulated hours of training and the budget constraints of the Polygraph unit. (Def. Ex. At 3, 5.) As the Defendant's burden is one of production and not persuasion, the Court's inquiry "can involve no credibility assessment." St Mary's Honor Center, 509 U.S. at 509. It is incumbent

upon the Plaintiff to now come forward with evidence of pretext; she has failed to make a coherent showing that the denial of training was pretextual. Accordingly, the Court will grant summary judgment to the Defendant on Plaintiff's denial of training claim.

C. Disparate Treatment

Plaintiff claims that she suffered disparate treatment at the hands of her supervisors because of discriminatory Performance Appraisal Reports ("PARs"). Defendant's advance the following arguments against this claim: (1) the performance evaluations were not "adverse employment actions"; (2) Leonard has failed to establish a causal nexus between the protected activity and the performance report; and (3) Plaintiff's poor interpersonal skills provided a legitimate non-discriminatory reason for the low scores.

Plaintiffs may establish a violation of Title VII for disparate treatment by showing by a preponderance of the evidence that he or she received "disparate treatment" from those employees who were not members of their protected class. Whitaker v. Titmus Optical Inc.; 311 F. Supp. 2d 522, 524 (E.D Va. 2002). A showing of "comparative disparate treatment" consists of evidence that (1) Plaintiff is a member of a protected class; (2) she was qualified for her job and her performance was satisfactory; (3) she was subjected to adverse employment action; and (4) other employees who are not members of the protected class were not subject to the adverse

employment action under apparently similar circumstances. Id. (citing Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).

The Fourth Circuit has clearly established what constitutes an adverse employment action: an adverse employment action "is a discriminatory act which adversely affects the terms, conditions or benefits or the plaintiff's employment." Von Gunten v. Maryland, 243 F.3d 858, 865 (4th Cir. 2001) (internal quotations and alteration omitted). "A downgrade of a performance evaluation could effect a term, condition, or benefit of employment if it has a tangible effect on the terms or conditions of employment." James v. Booz Allen & Hamilton, Inc.; 368 F.3d 371, 377 (4th Cir. 2004) (citing Von Gunten, 243 F.3d at 867). A poor performance evaluation "is actionable only where the employer subsequently uses the evaluation as a basis to detrimentally alter the terms or conditions of the recipient's employment." James, 368 F.3d. at 377. An evaluation merely causing a loss of prestige or status is not actionable. Id. (citing Cossette v. Minnesota Power & Light, 188 F. 3d 964, 972 (8th Cir. 1999)).

Summary Judgment for a Title VII defendant is appropriate in cases where a poor performance evaluation does not result in act that adversely affects the terms, conditions, or benefits of the plaintiff's employment. Thompson, 312, F.3d at 652 (noting that a poor performance evaluation did not constitute adverse employment action because the plaintiff lost no pay and

maintained the same position); Ingram, 2004 WL 350583, at *10 (2004) (granting summary judgment where there was no evidence that plaintiff suffered any tangible adverse consequences as a result of the poor performance evaluation and where plaintiff maintained thee same position and pay level following the evaluation); Jeffers v. Thompson, 264 F. Supp. 2d 314, 330 (D. Md. 2003) (holding that a poor performance rating does not itself constitute an adverse employment action, but becomes relevant evidence if it is relied upon for another averse action); Allen v. Rumsfeld, 273 F. Supp. 2d 695, 706 (D. Md. 2003) (holding that plaintiff's low performance evaluations did not constitute adverse employment actions where she lost no pay and maintained the same position following the evaluations, reprimands, and counseling); Chika v. Planning Research Corp., 179 F. Supp. 2d 575, 587 (D. Md. 2002) (ruling that two verbal reprimands did establish adverse employment actions where there was no evidence that they led to a demotion, termination, or had any impact on the plaintiff's job performance); Jackson v. Maryland, 171 F. Supp. 2d 532, 545 (D. Md. 2001) (stating that a poor evaluation by itself is not an adverse action that establishes a prima facie case of retaliation, especially when there is no evidence linking it to a missed opportunity for promotion).

In the instant case, Leonard only alleges that she received an unfavorable draft and final copies of her August to December 1998 PAR. The Complaint does not identify any adverse employment action that resulted from the performance evaluation. By its very nature, a draft performance evaluation was not final and could not

constitute an adverse employment action. Leonard was shown the report so that she could offer any corrections or suggest revisions. (Def. Ex. 2 at 7.) The draft did not form the basis for any personnel decision regarding Leonard. (See Def. Ex. 1 at 22; Ex. 2 at 7.) It was merely the opening salvo in an extended colloquy over the evaluation between Heidi F. and Leonard. (See Def. Ex. 2 at 2-3, 7, 9; Exs. 3-5.) The report became final only when Heidi F.'s supervisor sustained her evaluation. (Def. Ex. 5) Accordingly, the draft report did not adversely affect the terms, conditions or benefits of the plaintiff's employment.

Likewise, the final PAR does not constitute and adverse employment action, because Leonard has not shown that the Agency altered the terms, conditions, or benefits of her employment. Like the plaintiff in Allen, Leonard lost no pay and maintained the same position); Ingram, 2004 WL 350583, at *10 (holding that a poor performance evaluation was not actionable because plaintiff maintained the same position and pay level following the evaluation).

Leonard argues that her referrals to mental health professionals were adverse personnel actions. She has not offered, however, any evidence connecting the poor performance evaluation to those referrals. Her referral to Deese resulted from the e-mails and conversations, not her performance appraisals. (Def. Ex 8 5.) Plaintiff was placed on administrative leave, but the exact reasons for this leave remain uncertain. The Plaintiff has not shown

that it was caused by the poor performance evaluation. At oral argument, the Court learned that Leonard left the CIA on May 13, 2004. It is unclear whether she quit or was terminated. Assuming the latter – which would be an adverse employment action- Leonard has not shown a causal connection between her termination and her performance evaluations. The Court holds that the final performance review neither constitutes an adverse employment action nor led to the Agency taking one.

Again even assuming that Leonard carried her burden and established a prima facie case, se has not offered any evidence to rebut the Defendant's proffered legitimate nondiscriminatory reason for the poor performance evaluations: Plaintiff's poor interpersonal skills. One of the review criteria was the interpersonal skills of the polygraph examiner. (Def. Ex. 2 at 3, 5-6) The Agency has offered evidence that Heidi F. based the negative reviews on her own interactions with Leonard and her knowledge of Plaintiff's interaction with others. (Id. at 5-6.) Again the Defendant's burden is only one of production and cannot involve a credibility assessment. St. Mary's Honor Center, 509 U.S. at 509. The Court accepts this rationale as a legitimate nondiscriminatory reason for the poor evaluations. Leonard has not come forward with any evidence that this proffered rationale is pretextual. Accordingly, the Court will grant summary judgment to the Defendant on Leonard's disparate treatment claim.

C. Hostile Work Environment

In prohibiting discrimination in the "terms, conditions, or privileges of employment," 42 U.S.C.A. 2000e-2(a)(1), Title VII not only proscribes discriminatory acts that result in "tangible loss of an economic character," Anderson, 281 F.3d 452, 458 (4th Cir. 2002), but also prohibits situations "[w]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment," Harris v. Forklift Sys., Inc. 510 U.S. 17, 21 (1993) (internal quotations and citations omitted). To establish a Title VII claim for a hostile work environment, Leonard must prove that the offending conduct (1) was unwelcome, (2) was based on either her sex or her race, (3) was sufficiently severe or pervasive to alter the conditions of her employment and create an abusive work environment, and (4) was imputable to her employer. Anderson, 281 F. 3d at 458 (dealing with sex); Spriggs v. Diamond Auto Glass, 242 F. 3d 179, 183-84 (4th Cir. 2001) (concerning race).

Defendant only challenges the third element of the Plaintiff's prima facie case; the severe or pervasive nature of the conditions of employment. The third prong of a hostile environment claim involves both objective and subjective components. Anderson, 281 F. 3d at 459. The alleged conduct must be severe or pervasive enough to create an objectively hostile or abusive work environment; an environment that a reasonable person would find hostile or abusive. Harris, 510 U.S. at 21-22.

Moreover the conduct must be subjectively offensive to the plaintiff: "if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation." Id.

Defendant does not challenge the subjective component of the severe or pervasive, but instead contends that the workplace was not objectively hostile. In assessing whether a work environment is objectively hostile, a court must consider "all the circumstances," including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Anderson, 281 F.3d at 459. There is no single determinative factor. See id. The purpose of this standard is to "filter out complaints attacking 'the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender related jokes and occasional teasing.'" Ocheltree, 335 F.3d at 333. In assessing whether the environment was objectively hostile, the district court must remember that Title VII is "designed to protect working women from the kind of male attentions that can make the workplace hellish for women...[and] not designed to purge the workplace of vulgarity." Id. conduct, Courts generally require that the offensive conduct occur on a nearly constant basis. In Ocheltree, the Fourth Circuit reversed the district court's grant of summary judgment in a sex based hostile work environment case. 335 F.3d at 333. The court of appeals

held that reasonable jury could find that the harassment in the work environment was sufficiently severe or pervasive where the plaintiff was subjected every day to offensive conduct. Id. In Spriggs, the Fourth Circuit reversed the district court's award of summary judgment to an employer, overturning the trial court's finding that the racially offensive conduct was neither sever nor pervasive. 242 F.3d at 184-85. The Court held that plaintiff's supervisor's "incessant racial slurs, insults, and epithets" satisfied the objective prong of the severe and pervasive requirement. Id. at 185; see also Lyle v ESPN Zone 292 F. Supp. 2d 758, 763 (D. Md. 2003) (finding that co-worker's constant sexual solicitations and unwanted touches were objectively hostile).

The offensive conduct must also be of a sexually or racially discriminatory character. Courts will not find that generalized job grievances or personality conflicts absent harassment of a racial or sexual nature to constitute a hostile work environment. For example, in Hawkins v. PepsiCo., the Fourth Circuit affirmed the district court's dismissal of an employee's hostile work environment claim. 203 F. 3d 274 281 (4th Cir. 2000). The court of appeals held that the plaintiff failed to establish that the harassment was severe or pervasive because the plaintiff's complaints about her supervisor's management style were "without a hint of racial significance." Id. Moreover the panel noted that:

> Law does not blindly ascribe to race all personal conflicts between individuals of

> different races. To do so would turn the workplace into a litigious cauldron of racial suspicion. Instead, legally sufficient evidence is required to transform an ordinary conflict such as that between [an employee and employer] into an actionable claim of discrimination.

Id. at 282. Interpersonal disputes and squabbling over intra-office politics are not by themselves, actionable under Title VII.

In the instant case, Leonard's allegations do not meet the severe or pervasive requirement. Although Leonard details nearly 50 instances of conflict between her and other employees or supervisors, almost none of them involve sex or race. The events that did involve racial or specifically offensive behavior were sporadic and spread over the course of her employment. The incidents occurred over a period of four to five years and not on a constant or daily basis. Unlike the Plaintiff in Lyle, Leonard was not subject to sexual taunting and offensive touching on a daily basis. See 292 F. Supp. 2d at 763. Moreover, the workplace was not pervaded with hostile racial animus as in the Spriggs case. 242 F. 3d at 184-85 (finding supervisor constantly used racial slurs and insults). The Court does not find that Polygraph Unit at the CIA was objectively abusive either racially or sexually. Accordingly, the Court will grant summary judgment to the Defendant on Plaintiff's hostile work environment claim.

D. Retaliation

The final claim raised by Leonard is that the Agency retaliated against her for engaging in a protected activity. Title VII prohibits discrimination against any employee who "has opposed any...unlawful employment practice" under Title VII. 42 U.S.CA 2000e-3(a). In order to establish a prima facie case of retaliation, an employee must present evidence that (1) she engaged in protected activity; (2) her employer took an adverse employment action against her; and (3) there was a causal connection between the two events. Anderson, 281 F. 3d at 457-58. Once the Plaintiff has established a prima facie case, the burden shifts to the employer to articulate a legitimate, non-retaliatory reason for the adverse employment action. Id. at 458. If the employer succeeds in doing so, the plaintiff must then demonstrate that the employer's asserted reason is simply a pretext for retaliation. Id.

To establish a prima facie case of retaliation, a plaintiff must show that (1) she engaged in protected activity; (2) her employer took adverse employment action against her; an (3) a sufficient causal connection existed between her protected activity and her employer's adverse employment action. Miller v. Washington Workplace, Inc., 298, F. Supp. 2d 363, 375-76 (E.D. Va 2004)

Leonard cannot establish a prima facie case of retaliation. As stated in the section on disparate treatment, the draft and final PARs do not constitute adverse employment

actions in this matter: Leonard's referral for psychiatric evaluation and her termination.

Regarding Leonard's termination, Plaintiff has not alleged in her Complaint that her termination was retaliatory. Although Leonard was not required to exhaust her administrative remedies regarding the retaliation claim see Fletcher v. Tidewater Builders Ass'n, 216 F.R.D. 584, 590 (E.D. Va 2003), she still has failed to plead it in her Complaint; the Court is not "require[d]...to conjure up questions never squarely presented to them." Gordon, 574 F. 2d at 1278. Even considering the termination, Plaintiff has not offered any evidence to rebut the Defendant's showing that there is no causal connection between her protected activity and her termination.

To establish a prima facie case of retaliation, a Plaintiff must show that (1) she engaged in protected activity; (2) her employer took adverse employment action against her; and (3) a sufficient causal connection existed between her protected activity and her employer's adverse employment action. Miller v. Washington Workplace, Inc., 298 F. Supp. 2d 364, 375-76 (E.D. Va. 2004).

Leonard cannot establish a prima facie case of retaliation. As stated in the section on disparate treatment, the draft and final PARs do not constitute adverse employment actions. There are only two potential adverse employment actions in this matter: Leonard's referral for psychiatric evaluation and her termination.

Regarding Leonard's termination, Plaintiff has not alleged in her Complaint that her termination was retaliatory. Although Leonard was not required to exhaust her administrative remedies regarding the retaliation claim, see Fletcher v. Tidewater Builder's Ass'n, 216 F.R.D. 584, 590 (E.D. Va 2003), she still has failed to plead it in her Complaint; the Court is not "require[d]…to conjure up questions never squarely presented to them." Gordon 574 F.2d at 1278. Even considering the termination, Plaintiff has not offered any evidence to rebut the Defendant's showing that there is no causal connection between her termination and her termination.

Regarding the mental health referral, the Court will assume for purposes of this motion, that it constitutes an adverse employment action. The CIA, however, has articulated a legitimate nondiscriminatory reason for the referral; Meghan Deese's[8] developed genuine concerns for Plaintiff's mental stability. Plaintiff in emails to Deese claimed that her supervisors were surreptitiously recording her conversations and videotaping her activities by way of "special rings" and "special earrings" containing microphones and concealed video camera. (Def. Ex. At 1-2) The Court finds that the Defendant has met its burden of production. Plaintiff, however, has not come forward with any evidence to show that this rationale is mere pretext. Accordingly the Court will

[8] At the time of the events at issue Deese was the Chief of Counseling and Investigation Staff at the Equal Opportunity Office at the CIA.

grant summary judgment to the Defendant on Plaintiff's retaliation claim.

III. Conclusion

For the reasons stated above, the Court will grant the Defendant's motion for summary judgment.

June 30th , 2004 /s/James C. Cacheris
Alexandria, Virginia United States District Court Judge

Appendix D
Decision of the Federal District Court re: William Crumb

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

CINDY R. LEONARD,
Plaintiff,

v.

GEORGE J. TENET, Director, Central Intelligence Agency, United States of America, et al.;
Defendants.

Civil Action No. 03-1176-A

ORDER

Plaintiff has filed a paper (no. 15) that includes a motion for default judgment against defendant William Crumb. The court finds that defendant Crumb has not been served with a summons and a copy of the complaint, and is not in default. It is accordingly ORDERED that the motion is DENIED.

ENTERED this 15th day of January, 2004.

/s/ Thomas Rawles Jones, Jr.
United States Magistrate Judge

APPENDIX E
U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Office of Federal Operations
P.O. Box 19848
Washington, D. C. 20036

Helen A. Montgomery
Complainant,

v.

Porter J. Goss,
Director,
Central Intelligence Agency
Agency.

Request No. 05A50104

Appeal No. 01A44710
Agency No. 04-05

DENIAL

The Central Intelligence Agency (agency) timely requested reconsideration of the decision in Helen A. Montgomery v. Central Intelligence Agency, EEOC Appeal No. 01A44710 (September 20, 2004). EEOC Regulations provide that the Commission may, in its discretion, grant a request to reconsider any previous

Commission decision where the requesting party demonstrates that: (1) the appellate decision involved a clearly erroneous interpretation of material fact or law; or (2) the appellate decision will have a substantial impact on the policies, practices, or operations of the agency. See 29 C.F.R. 1614.405(b).

After reconsidering the previous decision and the entire record, the Commission finds that the request fails to meet the criteria of 29 C. F. R. 1614.405(b), and it is the decision of the Commission to deny the request. The decision in EEOC Appeal No. 01A44710 remains the Commission's final decision. There is no further right of administrative appeal on the decision of the Commission on this request.

ORDER (E0900)

The Agency is ordered to process claims (1) and (2) in accordance with 29 C. F. R. 1614.108. The Agency shall acknowledge to the complainant that it has received the remanded claims within thirty (30) calendar days of the date this decision becomes final. The Agency shall issue to complainant a copy of the investigative file and shall also notify complainant of the appropriate rights within one hundred fifty (150) calendar days of the date this decision becomes final, unless the matter is resolved prior to that time. If the complainant requests a final decision without a hearing, the agency shall issue a final decision within sixty (60) days of receipt of complainant's request.

A copy of the Agency's letter of acknowledgement to complainant and a copy of the notice that transmits the investigative file and the notice of rights must be sent to the Compliance Officer as referenced below.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0501)

Compliance with the Commission's corrective action is mandatory. The agency shall submit its compliance report within thirty (30) calendar days of the completion of all ordered corrective action. The report shall be submitted to the Compliance Officer, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, D. C. 20036. The agency's report must contain supporting documentation, and the agency must send a copy of all submissions to the complainant. If the agency does not comply with the Commission's order, the complainant may petition the Commission for enforcement of the order. 29 C. F. R. 1614.503(a). The complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F. R. 1614.407, 1614.408, and 29 C.F.R. 1614.503(g). Alternatively, the complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File A Civil Action." 29 C. F. R. 1614.407 and 1614.408. A civil action for enforcement of a civil action on the underlying complaint is subject to the deadline stated in 42 U.S. C 2000e-16(c) (1994 & Supp. IV 1999). If the

complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated. See C.F. R. 1614.409.

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (P0900)

This decision of the Commission if final, and there is no further right of administrative appeal form the Commission's decision. You have the right to file a civil action in an appropriate United States District Court within ninety (90) calendar days from the date that you receive this decision. If you file a civil action, you must name as the defendant in the complaint the person who is the official agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility, or department in which you work.

RIGHT TO REQUEST COUNSEL (Z1199)

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request that the Court appoint an attorney to represent you and that the Court permit you to file the action without payment of fees, costs, or other security. See Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e et seq.; the Rehabilitation Act of 1973, as amended, 29 U.S.C. 791, 794(c). The grant or denial of the request is within the sole discretion of the Court. Filing a request

for an attorney does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above ("Right to File A Civil Action").

FOR THE COMMISSION;

/s/ Carlton M. Hadden, Director
Office of Federal Operations
May 09 2005
Date

CERTIFICATE OF MAILING

For timeliness purposes, the Commission will presume that this decision was received within five (5) calendar days after it was mailed. I certify that this decision was mailed to complainant, complainant's representative (if applicable), and the agency on:

5/9/05
Date

/s/ Terri G
Equal Opportunity Assistant

APPENDIX F

PUBLIC LAW 104-191

AUG. 21, 1996

HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT OF 1996

Public Law 104-191
104th Congress

An Act

To amend the Internal Revenue Code of 1986 to improve portability and continuity of health insurance coverage in the group and individual markets, to combat waste, fraud, and abuse in health insurance and health care delivery, to promote the use of medical savings accounts, to improve access to long-term care services and coverage, to simplify the administration of health insurance, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.–This Act may be cited as the "Health Insurance Portability and Accountability Act of 1996".

(b) TABLE OF CONTENTS.--The table of contents of this Act is as follows:

Sec. 1. Short title; table of contents.

TITLE I--HEALTH CARE ACCESS, PORTABILITY, AND RENEWABILITY

TITLE II--PREVENTING HEALTH CARE FRAUD AND ABUSE; ADMINISTRATIVE SIMPLIFICATION; MEDICAL LIABILITY REFORM

Subtitle F--Administrative Simplification

- Sec. 261. Purpose.
- Sec. 262. Administrative simplification.

"Part C--Administrative Simplification

- "Sec. 1171. Definitions.
- "Sec. 1172. General requirements for adoption of standards.
- "Sec. 1173. Standards for information transactions and data elements.
- "Sec. 1174. Timetables for adoption of standards.
- "Sec. 1175. Requirements.
- "Sec. 1176. General penalty for failure to comply with requirements and standards.
- "Sec. 1177. Wrongful disclosure of individually identifiable health information.

- "Sec. 1178. Effect on State law.
- "Sec. 1179. Processing payment transactions.".

Sec. 263. Changes in membership and duties of National Committee on Vital and Health Statistics.

Sec. 264. Recommendations with respect to privacy of certain health information.

Subtitle F--Administrative Simplification

SEC. 261. PURPOSE.

It is the purpose of this subtitle to improve the Medicare program under title XVIII of the Social Security Act, the medicaid program under title XIX of such Act, and the efficiency and effectiveness of the health care system, by encouraging the development of a health information system through the establishment of standards and requirements for the electronic transmission of certain health information.

SEC. 262. ADMINISTRATIVE SIMPLIFICATION.

(a) IN GENERAL.--Title XI (42 U.S.C. 1301 et seq.) is amended by adding at the end the following:

"PART C--ADMINISTRATIVE SIMPLIFICATION

"DEFINITIONS

"SEC. 1171. For purposes of this part:

"(1) CODE SET.--The term 'code set' means any set of codes used for encoding data elements, such as tables of terms, medical concepts, medical diagnostic codes, or medical procedure codes.

"(2) HEALTH CARE CLEARINGHOUSE.--The term 'health care clearinghouse' means a public or private entity that processes or facilitates the processing of nonstandard data elements of health information into standard data elements.

"(3) HEALTH CARE PROVIDER.--The term 'health care provider' includes a provider of services (as defined in section 1861(u)), a provider of medical or other health services (as defined in section 1861(s)), and any other person furnishing health care services or supplies.

"(4) HEALTH INFORMATION.--The term 'health information' means any information, whether oral or recorded in any form or medium, that--

"(A) is created or received by a health care provider, health plan, public health authority, employer, life insurer, school or university, or health care clearinghouse; and

"(B) relates to the past, present, or future physical or mental health or condition of an individual, the provision

of health care to an individual, or the past, present, or future payment for the provision of health care to an individual.

"(5) HEALTH PLAN.--The term 'health plan' means an individual or group plan that provides, or pays the cost of, medical care (as such term is defined in section 2791 of the Public Health Service Act). Such term includes the following, and any combination thereof:

"(A) A group health plan (as defined in section 2791(a) of the Public Health Service Act), but only if the plan--

"(i) has 50 or more participants (as defined in section 3(7) of the Employee Retirement Income Security Act of 1974); or

"(ii) is administered by an entity other than the employer who established and maintains the plan.

"(B) A health insurance issuer (as defined in section 2791(b) of the Public Health Service Act).

"(C) A health maintenance organization (as defined in section 2791(b) of the Public Health Service Act).

"(D) Part A or part B of the Medicare program under title XVIII.

"(E) The medicaid program under title XIX.

"(F) A Medicare supplemental policy (as defined in section 1882(g)(1)).

"(G) A long-term care policy, including a nursing home fixed indemnity policy (unless the Secretary determines that such a policy does not provide sufficiently comprehensive coverage of a benefit so that the policy should be treated as a health plan).

"(H) An employee welfare benefit plan or any other arrangement which is established or maintained for the purpose of offering or providing health benefits to the employees of 2 or more employers.

"(I) The health care program for active military personnel under title 10, United States Code.

"(J) The veterans health care program under chapter 17 of title 38, United States Code.

"(K) The Civilian Health and Medical Program of the Uniformed Services (CHAMPUS), as defined in section 1072(4) of title 10, United States Code.

"(L) The Indian health service program under the Indian Health Care Improvement Act (25 U.S.C. 1601 et seq.).

"(M) The Federal Employees Health Benefit Plan under chapter 89 of title 5, United States Code.

"(6) INDIVIDUALLY IDENTIFIABLE HEALTH INFORMATION.--The term 'individually identifiable health information' means any information, including demographic information collected from an individual, that--

"(A) is created or received by a health care provider, health plan, employer, or health care clearinghouse; and

"(B) relates to the past, present, or future physical or mental health or condition of an individual, the provision of health care to an individual, or the past, present, or future payment for the provision of health care to an individual, and--

"(i) identifies the individual; or

"(ii) with respect to which there is a reasonable basis to believe that the information can be used to identify the individual.

"(7) STANDARD.--The term 'standard', when used with reference to a data element of health information or a transaction referred to in section 1173(a)(1), means any such data element or transaction that meets each of the standards and implementation specifications adopted or established by the Secretary with respect to the data element or transaction under sections 1172 through 1174.

"(8) STANDARD SETTING ORGANIZATION.--The term 'standard setting organization' means a standard

setting organization accredited by the American National Standards Institute, including the National Council for Prescription Drug Programs, that develops standards for information transactions, data elements, or any other standard that is necessary to, or will facilitate, the implementation of this part.

"GENERAL REQUIREMENTS FOR ADOPTION OF STANDARDS

"SEC. 1172. (a) APPLICABILITY.--Any standard adopted under this part shall apply, in whole or in part, to the following persons:

"(1) A health plan.

"(2) A health care clearinghouse.

"(3) A health care provider who transmits any health information in electronic form in connection with a transaction referred to in section 1173(a)(1).

"(b) REDUCTION OF COSTS.--Any standard adopted under this part shall be consistent with the objective of reducing the administrative costs of providing and paying for health care.

"(c) ROLE OF STANDARD SETTING ORGANIZATIONS.--

"(1) IN GENERAL.--Except as provided in paragraph (2), any standard adopted under this part shall be a standard that has been developed, adopted, or modified by a standard setting organization.

"(2) SPECIAL RULES.--

"(A) DIFFERENT STANDARDS.--The Secretary may adopt a standard that is different from any standard developed, adopted, or modified by a standard setting organization, if--

"(i) the different standard will substantially reduce administrative costs to health care providers and health plans compared to the alternatives; and

"(ii) the standard is promulgated in accordance with the rulemaking procedures of subchapter III of chapter 5 of title 5, United States Code.

"(B) NO STANDARD BY STANDARD SETTING ORGANIZATION.--If no standard setting organization has developed, adopted, or modified any standard relating to a standard that the Secretary is authorized or required to adopt under this part--

"(i) paragraph (1) shall not apply; and

"(ii) subsection (f) shall apply.

(3) CONSULTATION REQUIREMENT.--

"(A) IN GENERAL.--A standard may not be adopted under this part unless--

"(i) in the case of a standard that has been developed, adopted, or modified by a standard setting organization, the organization consulted with each of the organizations described in subparagraph (B) in the course of such development, adoption, or modification; and

"(ii) in the case of any other standard, the Secretary, in complying with the requirements of subsection (f), consulted with each of the organizations described in subparagraph (B) before adopting the standard.

"(B) ORGANIZATIONS DESCRIBED.--The organizations referred to in subparagraph (A) are the following:

"(i) The National Uniform Billing Committee.

"(ii) The National Uniform Claim Committee.

"(iii) The Workgroup for Electronic Data Interchange.

"(iv) The American Dental Association.

"(d) IMPLEMENTATION SPECIFICATIONS.--The Secretary shall establish

specifications for implementing each of the standards adopted under this

part.

"(e) PROTECTION OF TRADE SECRETS.--Except as otherwise required by law, a standard adopted under this part shall not require disclosure of trade secrets or confidential commercial information by a person required to comply with this part.

"(f) ASSISTANCE TO THE SECRETARY.--In complying with the requirements of this part, the Secretary shall rely on the recommendations of the National Committee on Vital and Health Statistics established under section 306(k) of the Public Health Service Act (42 U.S.C. 242k(k)), and shall consult with appropriate Federal and State agencies and private organizations. The Secretary shall publish in the Federal Register any recommendation of the National Committee on Vital and Health Statistics regarding the adoption of a standard under this part.

(g) APPLICATION TO MODIFICATIONS OF STANDARDS.--This section shall apply to a modification to a standard (including an addition to a standard) adopted under section 1174(b) in the same manner as it applies to an initial standard adopted under section 1174(a).

"STANDARDS FOR INFORMATION TRANSACTIONS AND DATA ELEMENTS

"SEC. 1173. (a) STANDARDS TO ENABLE ELECTRONIC EXCHANGE.--

"(1) IN GENERAL.--The Secretary shall adopt standards for transactions, and data elements for such transactions, to enable health information to be exchanged electronically, that are appropriate for--

"(A) the financial and administrative transactions described in paragraph (2); and

"(B) other financial and administrative transactions determined appropriate by the Secretary, consistent with the goals of improving the operation of the health care system and reducing administrative costs.

"(2) TRANSACTIONS.--The transactions referred to in paragraph (1)(A) are transactions with respect to the following:

"(A) Health claims or equivalent encounter information.

"(B) Health claims attachments.

"(C) Enrollment and disenrollment in a health plan.

"(D) Eligibility for a health plan.

"(E) Health care payment and remittance advice.

"(F) Health plan premium payments.

"(G) First report of injury.

"(H) Health claim status.

"(I) Referral certification and authorization.

"(3) ACCOMMODATION OF SPECIFIC PROVIDERS.--The standards adopted by the Secretary under paragraph (1) shall accommodate the needs of different types of health care providers.

(b) UNIQUE HEALTH IDENTIFIERS.--

"(1) IN GENERAL.--The Secretary shall adopt standards providing for a standard unique health identifier for each individual, employer, health plan, and health care provider for use in the health care system. In carrying out the preceding sentence for each health plan and health care provider, the Secretary shall take into account multiple uses for identifiers and multiple locations and specialty classifications for health care providers.

"(2) USE OF IDENTIFIERS.--The standards adopted under paragraph (1) shall specify the purposes for which a unique health identifier may be used.

(c) CODE SETS.--

"(1) IN GENERAL.--The Secretary shall adopt standards that--

"(A) select code sets for appropriate data elements for the transactions referred to in subsection (a)(1) from among the code sets that have been developed by private and public entities; or

"(B) establish code sets for such data elements if no code sets for the data elements have been developed.

"(2) DISTRIBUTION.--The Secretary shall establish efficient and low-cost procedures for distribution (including electronic distribution) of code sets and modifications made to such code sets under section 1174(b).

(d) SECURITY STANDARDS FOR HEALTH INFORMATION.--

"(1) SECURITY STANDARDS.--The Secretary shall adopt security standards that--

"(A) take into account--

"(i) the technical capabilities of record systems used to maintain health information;

"(ii) the costs of security measures;

"(iii) the need for training persons who have access to health information;

"(iv) the value of audit trails in computerized record systems; and

"(v) the needs and capabilities of small health care providers and rural health care providers (as such providers are defined by the Secretary); and

"(B) ensure that a health care clearinghouse, if it is part of a larger organization, has policies and security procedures which isolate the activities of the health care clearinghouse with respect to processing information in a manner that prevents unauthorized access to such information by such larger organization.

"(2) SAFEGUARDS.--Each person described in section 1172(a) who maintains or transmits health information shall maintain reasonable and appropriate administrative, technical, and physical safeguards--

"(A) to ensure the integrity and confidentiality of the information;

"(B) to protect against any reasonably anticipated--

"(i) threats or hazards to the security or integrity of the information; and

"(ii) unauthorized uses or disclosures of the information; and

"(C) otherwise to ensure compliance with this part by the officers and employees of such person.

(e) ELECTRONIC SIGNATURE.--

"(1) STANDARDS.--The Secretary, in coordination with the Secretary of Commerce, shall adopt standards specifying procedures for the electronic transmission and authentication of signatures with respect to the transactions referred to in subsection (a)(1).

"(2) EFFECT OF COMPLIANCE.--Compliance with the standards adopted under paragraph (1) shall be deemed to satisfy Federal and State statutory requirements for written signatures with respect to the transactions referred to in subsection (a)(1).

(f) TRANSFER OF INFORMATION AMONG HEALTH PLANS.--The Secretary shall adopt standards for transferring among health plans appropriate standard data elements needed for the coordination of benefits, the sequential processing of claims, and other data elements for individuals who have more than one health plan.

"TIMETABLES FOR ADOPTION OF STANDARDS

"SEC. 1174. (a) INITIAL STANDARDS.--The Secretary shall carry out section 1173 not later than 18 months after the date of the enactment of the Health Insurance Portability and Accountability Act of 1996, except that

standards relating to claims attachments shall be adopted not later than 30 months after such date.

"(b) ADDITIONS AND MODIFICATIONS TO STANDARDS.--

"(1) IN GENERAL.--Except as provided in paragraph (2), the Secretary shall review the standards adopted under section 1173, and shall adopt modifications to the standards (including additions to the standards), as determined appropriate, but not more frequently than once every 12 months. Any addition or modification to a standard shall be completed in a manner which minimizes the disruption and cost of compliance.

"(2) SPECIAL RULES.--

"(A) FIRST 12-MONTH PERIOD.--Except with respect to additions and modifications to code sets under subparagraph (B), the Secretary may not adopt any modification to a standard adopted under this part during the 12-month period beginning on the date the standard is initially adopted, unless the Secretary determines that the modification is necessary in order to permit compliance with the standard.

"(B) ADDITIONS AND MODIFICATIONS TO CODE SETS.--

"(i) IN GENERAL.--The Secretary shall ensure that procedures exist for the routine maintenance, testing, enhancement, and expansion of code sets.

"(ii) Additional rules.--If a code set is modified under this subsection, the modified code set shall include instructions on how data elements of health information that were encoded prior to the modification may be converted or translated so as to preserve the informational value of the data elements that existed before the modification. Any modification to a code set under this subsection shall be implemented in a manner that minimizes the disruption and cost of complying with such modification.

"REQUIREMENTS

"SEC. 1175. (a) CONDUCT OF TRANSACTIONS BY PLANS.--

"(1) IN GENERAL.--If a person desires to conduct a transaction referred to in section 1173(a)(1) with a health plan as a standard transaction--

"(A) the health plan may not refuse to conduct such transaction as a standard transaction;

"(B) the insurance plan may not delay such transaction, or otherwise adversely affect, or attempt to adversely affect, the person or the transaction on the ground that the transaction is a standard transaction; and

"(C) the information transmitted and received in connection with the transaction shall be in the form of standard data elements of health information.

"(2) SATISFACTION OF REQUIREMENTS.--A health plan may satisfy the requirements under paragraph (1) by--

"(A) directly transmitting and receiving standard data elements of health information; or

"(B) submitting nonstandard data elements to a health care clearinghouse for processing into standard data elements and transmission by the health care clearinghouse, and receiving standard data elements through the health care clearinghouse.

"(3) TIMETABLE FOR COMPLIANCE.--Paragraph (1) shall not be construed to require a health plan to comply with any standard, implementation specification, or modification to a standard or specification adopted or established by the Secretary under sections 1172 through 1174 at any time prior to the date on which the plan is required to comply with the standard or specification under subsection (b).

"(b) COMPLIANCE WITH STANDARDS.--

"(1) INITIAL COMPLIANCE.--

"(A) IN GENERAL.--Not later than 24 months after the date on which an initial standard or implementation specification is adopted or established under sections 1172 and 1173, each person to whom the standard or implementation specification applies shall comply with the standard or specification.

"(B) SPECIAL RULE FOR SMALL HEALTH PLANS.--In the case of a small health plan, paragraph (1) shall be applied by substituting '36 months' for '24 months'. For purposes of this subsection, the Secretary shall determine the plans that qualify as small health plans.

"(2) COMPLIANCE WITH MODIFIED STANDARDS.--If the Secretary adopts a modification to a standard or implementation specification under this part, each person to whom the standard or implementation specification applies shall comply with the modified standard or implementation specification at such time as the Secretary determines appropriate, taking into account the time needed to comply due to the nature and extent of the modification. The time determined appropriate under the preceding sentence may not be earlier than the last day of the 180-day period beginning on the date such modification is adopted. The Secretary may extend the time for compliance for small health plans, if the Secretary determines that such extension is appropriate.

"(3) CONSTRUCTION.--Nothing in this subsection shall be construed to prohibit any person from complying with a standard or specification by--

"(A) submitting nonstandard data elements to a health care clearinghouse for processing into standard data elements and transmission by the health care clearinghouse; or

"(B) receiving standard data elements through a health care clearinghouse.

"GENERAL PENALTY FOR FAILURE TO COMPLY WITH REQUIREMENTS AND STANDARDS

"SEC. 1176. (a) GENERAL PENALTY.--

"(1) IN GENERAL.--Except as provided in subsection (b), the Secretary shall impose on any person who violates a provision of this part a penalty of not more than $100 for each such violation, except that the total amount imposed on the person for all violations of an identical requirement or prohibition during a calendar year may not exceed $25,000.

"(2) PROCEDURES.--The provisions of section 1128A (other than subsections (a) and (b) and the second sentence of subsection (f)) shall apply to the imposition of a civil money penalty under this subsection in the same manner as such provisions apply to the imposition of a penalty under such section 1128A.

"(b) LIMITATIONS.--

"(1) OFFENSES OTHERWISE PUNISHABLE.--A penalty may not be imposed under subsection (a) with respect to an act if the act constitutes an offense punishable under section 1177.

"(2) NONCOMPLIANCE NOT DISCOVERED.--A penalty may not be imposed under subsection (a) with respect to a provision of this part if it is established to the satisfaction of the Secretary that the person liable for the penalty did not know, and by exercising reasonable diligence would not have known, that such person violated the provision.

"(3) FAILURES DUE TO REASONABLE CAUSE.--

"(A) IN GENERAL.--Except as provided in subparagraph (B), a penalty may not be imposed under subsection (a) if--

"(i) the failure to comply was due to reasonable cause and not to willful neglect; and

"(ii) the failure to comply is corrected during the 30-day period beginning on the first date the person liable for the penalty knew, or by exercising reasonable diligence would have known, that the failure to comply occurred.

"(B) EXTENSION OF PERIOD.--

"(i) NO PENALTY.--The period referred to in subparagraph (A)(ii) may be extended as determined

appropriate by the Secretary based on the nature and extent of the failure to comply.

"(ii) ASSISTANCE.--If the Secretary determines that a person failed to comply because the person was unable to comply, the Secretary may provide technical assistance to the person during the period described in subparagraph (A)(ii). Such assistance shall be provided in any manner determined appropriate by the Secretary.

"(4) REDUCTION.--In the case of a failure to comply which is due to reasonable cause and not to willful neglect, any penalty under subsection (a) that is not entirely waived under paragraph (3) may be waived to the extent that the payment of such penalty would be excessive relative to the compliance failure involved.

"WRONGFUL DISCLOSURE OF INDIVIDUALLY IDENTIFIABLE HEALTH INFORMATION

"SEC. 1177. (a) OFFENSE.--A person who knowingly and in violation of this part--

"(1) uses or causes to be used a unique health identifier;

"(2) obtains individually identifiable health information relating to an individual; or

"(3) discloses individually identifiable health information to another person,

shall be punished as provided in subsection (b).

"(b) PENALTIES.--A person described in subsection (a) shall--

"(1) be fined not more than $50,000, imprisoned not more than 1 year, or both;

"(2) if the offense is committed under false pretenses, be fined not more than $100,000, imprisoned not more than 5 years, or both; and

"(3) if the offense is committed with intent to sell, transfer, or use individually identifiable health information for commercial advantage, personal gain, or malicious harm, be fined not more than $250,000, imprisoned not more than 10 years, or both.

"EFFECT ON STATE LAW

"SEC. 1178. (a) GENERAL EFFECT.--

"(1) GENERAL RULE.--Except as provided in paragraph (2), a provision or requirement under this part, or a standard or implementation specification adopted or established under sections 1172 through 1174, shall supersede any contrary provision of State law, including a provision of State law that requires medical or health plan records (including billing information) to be maintained or transmitted in written rather than electronic form.

"(2) EXCEPTIONS.--A provision or requirement under this part, or a standard or implementation specification adopted or established under sections 1172 through 1174, shall not supersede a contrary provision of State law, if the provision of State law--

"(A) is a provision the Secretary determines--

"(i) is necessary--

"(I) to prevent fraud and abuse;

"(II) to ensure appropriate State regulation of insurance and health plans;

"(III) for State reporting on health care delivery or costs; or

"(IV) for other purposes; or

"(ii) addresses controlled substances; or

"(B) subject to section 264(c)(2) of the Health Insurance Portability and Accountability Act of 1996, relates to the privacy of individually identifiable health information.

"(b) PUBLIC HEALTH.--Nothing in this part shall be construed to invalidate or limit the authority, power, or procedures established under any law providing for the reporting of disease or injury, child abuse, birth, or death,

public health surveillance, or public health investigation or intervention.

"(c) STATE REGULATORY REPORTING.--Nothing in this part shall limit the ability of a State to require a health plan to report, or to provide access to, information for management audits, financial audits, program monitoring and evaluation, facility licensure or certification, or individual licensure or certification.

"PROCESSING PAYMENT TRANSACTIONS BY FINANCIAL INSTITUTIONS

"SEC. 1179. To the extent that an entity is engaged in activities of a financial institution (as defined in section 1101 of the Right to Financial Privacy Act of 1978), or is engaged in authorizing, processing, clearing, settling, billing,

transferring, reconciling, or collecting payments, for a financial institution, this part, and any standard adopted under this part, shall not apply to the entity with respect to such activities, including the following:

"(1) The use or disclosure of information by the entity for authorizing, processing, clearing, settling, billing, transferring, reconciling or collecting, a payment for, or related to, health plan premiums or health care, where such payment is made by any means, including a credit, debit, or other payment card, an account, check, or electronic funds transfer.

"(2) The request for, or the use or disclosure of, information by the entity with respect to a payment described in paragraph (1)--

"(A) for transferring receivables;

"(B) for auditing;

"(C) in connection with--

"(i) a customer dispute; or

"(ii) an inquiry from, or to, a customer;

"(D) in a communication to a customer of the entity regarding the customer's transactions, payment card, account, check, or electronic funds transfer;

"(E) for reporting to consumer reporting agencies; or

"(F) for complying with--

"(i) a civil or criminal subpoena; or

"(ii) a Federal or State law regulating the entity."

(b) CONFORMING AMENDMENTS.--

(1) REQUIREMENT FOR MEDICARE PROVIDERS.-- Section 1866(a)(1) (42 U.S.C. 1395cc(a)(1)) is amended--

(A) by striking ``and" at the end of subparagraph (P);

(B) by striking the period at the end of subparagraph (Q) and inserting "; and"; and

(C) by inserting immediately after subparagraph (Q) the following new subparagraph:

"(R) to contract only with a health care clearinghouse (as defined in section 1171) that meets each standard and implementation specification adopted or established under part C of title XI on or after the date on which the health care clearinghouse is required to comply with the standard or specification.".

(2) TITLE HEADING.--Title XI (42 U.S.C. 1301 et seq.) is amended by striking the title heading and inserting the following:

"TITLE XI--GENERAL PROVISIONS, PEER REVIEW, AND ADMINISTRATIVE SIMPLIFICATION".

SEC. 263. CHANGES IN MEMBERSHIP AND DUTIES OF NATIONAL COMMITTEE ON VITAL AND HEALTH STATISTICS.

Section 306(k) of the Public Health Service Act (42 U.S.C. 242k(k))

is amended--

(1) in paragraph (1), by striking "16" and inserting "18";

(2) by amending paragraph (2) to read as follows:

"(2) The members of the Committee shall be appointed from among persons who have distinguished themselves in the fields of health statistics, electronic interchange of health care information, privacy and security of electronic information, population-based public health, purchasing or financing health care services, integrated computerized health information systems, health services research, consumer interests in health information, health data standards, epidemiology, and the provision of health services. Members of the Committee shall be appointed for terms of 4 years.";

(3) by redesignating paragraphs (3) through (5) as paragraphs (4) through (6), respectively, and inserting after paragraph (2) the following:

"(3) Of the members of the Committee--

"(A) 1 shall be appointed, not later than 60 days after the date of the enactment of the Health Insurance Portability and Accountability Act of 1996, by the Speaker of the House of Representatives after consultation with the Minority Leader of the House of Representatives;

"(B) 1 shall be appointed, not later than 60 days after the date of the enactment of the Health Insurance Portability and Accountability Act of 1996, by the President pro

tempore of the Senate after consultation with the Minority Leader of the Senate; and

"(C) 16 shall be appointed by the Secretary.";

(4) by amending paragraph (5) (as so redesignated) to read as follows:

"(5) The Committee--

"(A) shall assist and advise the Secretary--

"(i) to delineate statistical problems bearing on health and health services which are of national or international interest;

"(ii) to stimulate studies of such problems by other organizations and agencies whenever possible or to make investigations of such problems through subcommittees;

"(iii) to determine, approve, and revise the terms, definitions, classifications, and guidelines for assessing health status and health services, their distribution and costs, for use (I) within the Department of Health and Human Services, (II) by all programs administered or funded by the Secretary, including the Federal-State-local cooperative health statistics system referred to in subsection (e), and (III) to the extent possible as determined by the head of the agency involved, by the Department of Veterans Affairs, the Department of

Defense, and other Federal agencies concerned with health and health services;

"(iv) with respect to the design of and approval of health statistical and health information systems concerned with the collection, processing, and tabulation of health statistics within the Department of Health and Human Services, with respect to the Cooperative Health Statistics System established under subsection (e), and with respect to the standardized means for the collection of health information and statistics to be established by the Secretary under subsection (j)(1);

"(v) to review and comment on findings and proposals developed by other organizations and agencies and to make recommendations for their adoption or implementation by local, State, national, or international agencies;

"(vi) to cooperate with national committees of other countries and with the World Health Organization and other national agencies in the studies of problems of mutual interest;

"(vii) to issue an annual report on the state of the Nation's health, its health services, their costs and distributions, and to make proposals for improvement of the Nation's health statistics and health information systems; and

"(viii) in complying with the requirements imposed on the Secretary under part C of title XI of the Social Security Act;

"(B) shall study the issues related to the adoption of uniform data standards for patient medical record information and the electronic exchange of such information;

"(C) shall report to the Secretary not later than 4 years after the date of the enactment of the Health Insurance Portability and Accountability Act of 1996 recommendations and legislative proposals for such standards and electronic exchange; and

"(D) shall be responsible generally for advising the Secretary and the Congress on the status of the implementation of part C of title XI of the Social Security Act."; and

(5) by adding at the end the following:

"(7) Not later than 1 year after the date of the enactment of the Health Insurance Portability and Accountability Act of 1996, and annually thereafter, the Committee shall submit to the Congress, and make public, a report regarding the implementation of part C of title XI of the Social Security Act. Such report shall address the following subjects, to the extent that the Committee determines appropriate:

"(A) The extent to which persons required to comply with part C of title XI of the Social Security Act are cooperating in implementing the standards adopted under such part.

"(B) The extent to which such entities are meeting the security standards adopted under such part and the types of penalties assessed for noncompliance with such standards.

"(C) Whether the Federal and State Governments are receiving information of sufficient quality to meet their responsibilities under such part.

"(D) Any problems that exist with respect to implementation of such part.

"(E) The extent to which timetables under such part are being met.".

SEC. 264. RECOMMENDATIONS WITH RESPECT TO PRIVACY OF CERTAIN HEALTH INFORMATION.

(a) IN GENERAL.--Not later than the date that is 12 months after the date of the enactment of this Act, the Secretary of Health and Human Services shall submit to the Committee on Labor and Human Resources and the Committee on Finance of the Senate and the Committee on Commerce and the Committee on Ways and Means of the House of Representatives detailed recommendations

on standards with respect to the privacy of individually identifiable health information.

(b) SUBJECTS FOR RECOMMENDATIONS.--The recommendations under subsection (a) shall address at least the following:

(1) The rights that an individual who is a subject of individually identifiable health information should have.

(2) The procedures that should be established for the exercise of such rights.

(3) The uses and disclosures of such information that should be authorized or required.

(c) REGULATIONS.--

(1) IN GENERAL.--If legislation governing standards with respect to the privacy of individually identifiable health information transmitted in connection with the transactions described in section 1173(a) of the Social Security Act (as added by section 262) is not enacted by the date that is 36 months after the date of the enactment of this Act, the Secretary of Health and Human Services shall promulgate final regulations containing such standards not later than the date that is 42 months after the date of the enactment of this Act. Such regulations shall address at least the subjects described in subsection (b).

(2) PREEMPTION.--A regulation promulgated under paragraph (1) shall not supercede a contrary provision of State law, if the provision of State law imposes requirements, standards, or implementation specifications that are more stringent than the requirements, standards, or implementation specifications imposed under the regulation.

(d) CONSULTATION.--In carrying out this section, the Secretary of Health and Human Services shall consult with--

(1) the National Committee on Vital and Health Statistics established under section 306(k) of the Public Health Service Act (42 U.S.C. 242k(k)); and

(2) the Attorney General.

APPENDIX G

An Act

To enforce the constitutional right to vote, to confer jurisdiction upon
the district courts of the United States to provide injunctive relief
against discrimination in public accommodations, to authorize the attorney
General to institute suits to protect constitutional rights in public
facilities and public education, to extend the Commission on Civil Rights,
to prevent discrimination in federally assisted programs, to establish a
Commission on Equal Employment Opportunity, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United
States of America in Congress assembled, That this Act may be cited as the
"Civil Rights Act of 1964".

DEFINITIONS

SEC. 2000e. [Section 701]

For the purposes of this subchapter-

(a) The term ``person'' includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, jointstock companies, trusts, unincorporated organizations,trustees, trustees in cases under title 11 [bankruptcy], or receivers.

(b) The term ``employer'' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5 [of the United States Code]), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of title 26 [the Internal Revenue Code of 1954], except that during the first year after March 24, 1972 [the date of enactment of the Equal Employment Opportunity Act of 1972], persons having fewer than twentyfive employees (and their agents) shall not be considered employers.

(c) The term ``employment agency'' means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for

employees opportunities to work for an employer and includes an agent of such a person.

(d) The term ``labor organization'' means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is (A) twentyfive or more during the first year after March 24, 1972 [the date of enactment of the Equal Employment Opportunity Act of 1972], or (B) fifteen or more thereafter, and such labor organization-

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended [29 U.S.C. 151 et seq.], or the Railway Labor Act, as amended [45 U.S.C. 151 et seq.];

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term ``employee'' means an individual employed by an employer, except that the term ``employee'' shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(g) The term ``commerce'' means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term ``industry affecting commerce'' means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry ``affecting commerce'' within the meaning of the LaborManagement Reporting and Disclosure Act of 1959 [29 U.S.C. 401 et seq.], and further includes any governmental industry, business, or activity.

(i) The term ``State'' includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act [43 U.S.C. 1331 et seq.].

(j) The term ``religion'' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

(k) The terms ``because of sex'' or ``on the basis of sex'' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employmentrelated purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title [section 703(h)] shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: Provided, That nothing herein shall preclude an employer from providing abortion

benefits or otherwise affect bargaining agreements in regard to abortion.

(l) The term ``complaining party'' means the Commission, the Attorney General, or a person who may bring an action or proceeding under this subchapter.

(m) The term ``demonstrates'' means meets the burdens of production and persuasion.

(n) The term ``respondent'' means an employer, employment agency, labor organization, joint labor-management committee controlling apprenticeship or other training or retraining program, including an on-the-job training program, or Federal entity subject to section 2000e-16 of this title .

EXEMPTION

SEC. 2000e-1. [Section 702]

(a) This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

(b) It shall not be unlawful under section 2000e-2 or 2000e-3 of this title [section 703 or 704] for an employer (or a corporation controlled by an employer), labor organization, employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining (including onthejob training programs) to take any action otherwise prohibited by such section, with respect to an employee in a workplace in a foreign country if compliance with such section would cause such employer (or such corporation), such organization, such agency, or such committee to violate the law of the foreign country in which such workplace is located.

(c) (1) If an employer controls a corporation whose place of incorporation is a foreign country, any practice prohibited by section 2000e-2 or 2000e-3 of this title [section 703 or 704] engaged in by such corporation shall be presumed to be engaged in by such employer.

(2) Sections 2000e-2 and 2000e-3 of this title [sections 703 and 704] shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.

(3) For purposes of this subsection, the determination of whether an employer controls a corporation shall be based on-

(A) the interrelation of operations;

(B) the common management;

(C) the centralized control of labor relations; and

(D) the common ownership or financial control, of the employer and the
corporation.

UNLAWFUL EMPLOYMENT PRACTICES

SEC. 2000e-2. [Section 703]

(a) It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for

employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) It shall be an unlawful employment practice for a labor organization-

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labormanagement committee controlling apprenticeship or other training or retraining, including onthejob training programs to

discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labormanagement committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) As used in this subchapter, the phrase ``unlawful employment practice'' shall not be deemed to include any action or measure taken by an employer, labor organization, joint labormanagement committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communistaction or Communistfront organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950 [50 U.S.C. 781 et seq.].

(g) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if-

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of title 29 [section 6(d) of the Fair Labor Standards Act of 1938, as amended].

(i) Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment

practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labormanagement committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

(k) (1) (A) An unlawful employment practice based on disparate impact is established under this title only if-

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate

that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

(B) (i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of ``alternative employment practice".

(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this title.

(3) Notwithstanding any other provision of this title, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act [21 U.S.C. 801 et seq.] or any other provision of Federal law, shall be considered an unlawful employment practice under this title only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.

(l) It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.

(m) Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any

employment practice, even though other factors also motivated the practice.

(n) (1) (A) Notwithstanding any other provision of law, and except as provided in paragraph (2), an employment practice that implements and is within the scope of a litigated or consent judgment or order that resolves a claim of employment discrimination under the Constitution or Federal civil rights laws may not be challenged under the circumstances described in subparagraph (B).

(B) A practice described in subparagraph (A) may not be challenged in a claim under the Constitution or Federal civil rights laws-

(i) by a person who, prior to the entry of the judgment or order described in subparagraph (A), had-

(I) actual notice of the proposed judgment or order sufficient to apprise such person that such judgment or order might adversely affect the interests and legal rights of such person and that an opportunity was available to present objections to such judgment or order by a future date certain; and

(II) a reasonable opportunity to present objections to such judgment or order; or

(ii) by a person whose interests were adequately represented by another person who had previously

challenged the judgment or order on the same legal grounds and with a similar factual situation, unless there has been an intervening change in law or fact.

(2) Nothing in this subsection shall be construed to-

(A) alter the standards for intervention under rule 24 of the Federal Rules of Civil Procedure or apply to the rights of parties who have successfully intervened pursuant to such rule in the proceeding in which the parties intervened;

(B) apply to the rights of parties to the action in which a litigated or consent judgment or order was entered, or of members of a class represented or sought to be represented in such action, or of members of a group on whose behalf relief was sought in such action by the Federal Government;

(C) prevent challenges to a litigated or consent judgment or order on the ground that such judgment or order was obtained through collusion or fraud, or is transparently invalid or was entered by a court lacking subject matter jurisdiction; or

(D) authorize or permit the denial to any person of the due process of law required by the Constitution.

(3) Any action not precluded under this subsection that challenges an employment consent judgment or order described in paragraph (1) shall be brought in the court,

and if possible before the judge, that entered such judgment or order. Nothing in this subsection shall preclude a transfer of such action pursuant to section 1404 of title 28, United States Code.

OTHER UNLAWFUL EMPLOYMENT PRACTICES

SEC. 2000e-3. [Section 704]

(a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labormanagement committee controlling apprenticeship or other training or retraining, including onthejob training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

(b) It shall be an unlawful employment practice for an employer, labor organization, employment agency, or joint labormanagement committee controlling apprenticeship or other training or retraining, including onthejob training programs, to print or publish or cause to be printed or published any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for

employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, or relating to admission to, or employment in, any program established to provide apprenticeship or other training by such a joint labor-management committee, indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin, except that such a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion, sex, or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

SEC. 2000e-4. [Section 705]

(a) There is hereby created a Commission to be known as the Equal Employment Opportunity Commission, which shall be composed of five members, not more than three of whom shall be members of the same political party. Members of the Commission shall be appointed by the President by and with the advice and consent of the Senate for a term of five years. Any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed, and all members of the Commission shall continue to serve until their successors are appointed and qualified, except that

no such member of the Commission shall continue to serve (1) for more than sixty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment sine die of the session of the Senate in which such nomination was submitted. The President shall designate one member to serve as Chairman of the Commission, and one member to serve as Vice Chairman. The Chairman shall be responsible on behalf of the Commission for the administrative operations of the Commission, and, except as provided in subsection (b) of this section, shall appoint, in accordance with the provisions of title 5 [United States Code] governing appointments in the competitive service, such officers, agents, attorneys, administrative law judges [hearing examiners], and employees as he deems necessary to assist it in the performance of its functions and to fix their compensation in accordance with the provisions of chapter 51 and subchapter III of chapter 53 of title 5 [United States Code], relating to classification and General Schedule pay rates: Provided, That assignment, removal, and compensation of administrative law judges [hearing examiners] shall be in accordance with sections 3105, 3344, 5372, and 7521 of title 5 [United States Code].

(b) (1) There shall be a General Counsel of the Commission appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel shall have responsibility for the conduct of litigation as provided in sections 2000e-5 and

2000e-6 of this title [sections 706 and 707]. The General Counsel shall have such other duties as the Commission may prescribe or as may be provided by law and shall concur with the Chairman of the Commission on the appointment and supervision of regional attorneys. The General Counsel of the Commission on the effective date of this Act shall continue in such position and perform the functions specified in this subsection until a successor is appointed and qualified.

(2) Attorneys appointed under this section may, at the direction of the Commission, appear for and represent the Commission in any case in court, provided that the Attorney General shall conduct all litigation to which the Commission is a party in the Supreme Court pursuant to this subchapter.

(c) A vacancy in the Commission shall not impair the right of the remaining members to exercise all the powers of the Commission and three members thereof shall constitute a quorum.

(d) The Commission shall have an official seal which shall be judicially noticed.

(e) The Commission shall at the close of each fiscal year report to the Congress and to the President concerning the action it has taken [the names, salaries, and duties of all individuals in its employ] and the moneys it has disbursed. It shall make such further reports on the cause of and means of eliminating discrimination and such

recommendations for further legislation as may appear desirable.

(f) The principal office of the Commission shall be in or near the District of Columbia, but it may meet or exercise any or all its powers at any other place. The Commission may establish such regional or State offices as it deems necessary to accomplish the purpose of this subchapter.

(g) The Commission shall have power-

(1) to cooperate with and, with their consent, utilize regional, State, local, and other agencies, both public and private, and individuals;

(2) to pay to witnesses whose depositions are taken or who are summoned before the Commission or any of its agents the same witness and mileage fees as are paid to witnesses in the courts of the United States;

(3) to furnish to persons subject to this subchapter such technical assistance as they may request to further their compliance with this subchapter or an order issued thereunder;

(4) upon the request of (i) any employer, whose employees or some of them, or (ii) any labor organization, whose members or some of them, refuse or threaten to refuse to cooperate in effectuating the provisions of this subchapter, to assist in such effectuation by conciliation

or such other remedial action as is provided by this subchapter;

(5) to make such technical studies as are appropriate to effectuate the purposes and policies of this subchapter and to make the results of such studies available to the public;

(6) to intervene in a civil action brought under section 2000e-5 of this title [section 706] by an aggrieved party against a respondent other than a government, governmental agency or political subdivision.

(h) (1) The Commission shall, in any of its educational or promotional activities, cooperate with other departments and agencies in the performance of such educational and promotional activities.

(2) In exercising its powers under this title, the Commission shall carry out educational and outreach activities (including dissemination of information in languages other than English) targeted to-

(A) individuals who historically have been victims of employment discrimination and have not been equitably served by the Commission; and

(B) individuals on whose behalf the Commission has authority to enforce any other law prohibiting employment discrimination, concerning rights and obligations under this title or such law, as the case may be.

(i) All officers, agents, attorneys, and employees of the Commission shall be subject to the provisions of section 7324 of title 5 [section 9 of the Act of August 2, 1939, as amended (the Hatch Act)], notwithstanding any exemption contained in such section.

(j) (1) The Commission shall establish a Technical Assistance Training Institute, through which the Commission shall provide technical assistance and training regarding the laws and regulations enforced by the Commission.

(2) An employer or other entity covered under this title shall not be excused from compliance with the requirements of this title because of any failure to receive technical assistance under this subsection.

(3) There are authorized to be appropriated to carry out this subsection such sums as may be necessary for fiscal year 1992.

ENFORCEMENT PROVISIONS

SEC. 2000e-5. [Section 706]

(a) The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title [section 703 or 704].

(b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labormanagement committee controlling apprenticeship or other training or retraining, including onthejob training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labormanagement committee (hereinafter referred to as the ``respondent'') within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section. If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of

conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge.

(c) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixtyday period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of

such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

(d) In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixtyday period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(e) (1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within

ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(2) For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this title (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.

(f) (1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action

against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section, is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed

by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having

jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28 [of the United States Code], the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting

chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

(g) (1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

(2) (A) No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title [section 704(a)].

(B) On a claim in which an individual proves a violation under section 2000e-2(m) of this title [section 703(m)] and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court-

(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title [section 703(m)]; and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

(h) The provisions of chapter 6 of title 29 [the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (29 U.S.C.

105-115)] shall not apply with respect to civil actions brought under this section.

(i) In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under this section, the Commission may commence proceedings to compel compliance with such order.

(j) Any civil action brought under this section and any proceedings brought under subsection (i) of this section shall be subject to appeal as provided in sections 1291 and 1292, title 28 [United States Code].

(k) In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

CIVIL ACTIONS BY THE ATTORNEY GENERAL

SEC. 2000e-6. [Section 707]

(a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the

Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

(b) The district courts of the United States shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, and in any such proceeding the Attorney General may file with the clerk of such court a request that a court of three judges be convened to hear and determine the case. Such request by the Attorney General shall be accompanied by a certificate that, in his opinion, the case is of general public importance. A copy of the certificate and request for a threejudge court shall be immediately furnished by such clerk to the chief judge of the circuit (or in his absence, the presiding circuit judge of the circuit) in which the case is pending. Upon receipt of such request it shall be the duty of the chief judge of the circuit or the presiding circuit judge, as the case may be, to designate immediately three judges in such circuit, of whom at least one shall be a circuit judge and another of whom shall be a district judge of the court in which the proceeding was instituted, to hear and determine such case, and it shall be the duty of the judges so designated to assign the case for hearing at the earliest practicable

date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited. An appeal from the final judgment of such court will lie to the Supreme Court.

In the event the Attorney General fails to file such a request in any such proceeding, it shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

It shall be the duty of the judge designated pursuant to this section to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited.

(c) Effective two years after March 24, 1972 [the date of enactment of the Equal Employment Opportunity Act of 1972], the functions of the Attorney General under this section shall be transferred to the Commission, together with such personnel, property, records, and unexpended balances of appropriations, allocations, and other funds employed, used, held, available, or to be made available in connection with such functions unless the President

submits, and neither House of Congress vetoes, a reorganization plan pursuant to chapter 9 of title 5 [United States Code], inconsistent with the provisions of this subsection. The Commission shall carry out such functions in accordance with subsections (d) and (e) of this section.

(d) Upon the transfer of functions provided for in subsection (c) of this section, in all suits commenced pursuant to this section prior to the date of such transfer, proceedings shall continue without abatement, all court orders and decrees shall remain in effect, and the Commission shall be substituted as a party for the United States of America, the Attorney General, or the Acting Attorney General, as appropriate.

(e) Subsequent to March 24, 1972 [the date of enactment of the Equal Employment Opportunity Act of 1972], the Commission shall have authority to investigate and act on a charge of a pattern or practice of discrimination, whether filed by or on behalf of a person claiming to be aggrieved or by a member of the Commission. All such actions shall be conducted in accordance with the procedures set forth in section 2000e-5 of this title [section 706].

EFFECT ON STATE LAWS

SEC. 2000e-7. [Section 708] Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any

present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.

INVESTIGATIONS, INSPECTIONS, RECORDS, STATE AGENCIES

SEC. 2000e-8. [Section 709]

(a) In connection with any investigation of a charge filed under section 2000e-5 of this title [section 706], the Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this subchapter and is relevant to the charge under investigation.

(b) The Commission may cooperate with State and local agencies charged with the administration of State fair employment practices laws and, with the consent of such agencies, may, for the purpose of carrying out its functions and duties under this subchapter and within the limitation of funds appropriated specifically for such purpose, engage in and contribute to the cost of research and other projects of mutual interest undertaken by such agencies, and utilize the services of such agencies and their employees, and, notwithstanding any other provision of law, pay by advance or reimbursement such agencies

and their employees for services rendered to assist the Commission in carrying out this subchapter. In furtherance of such cooperative efforts, the Commission may enter into written agreements with such State or local agencies and such agreements may include provisions under which the Commission shall refrain from processing a charge in any cases or class of cases specified in such agreements or under which the Commission shall relieve any person or class of persons in such State or locality from requirements imposed under this section. The Commission shall rescind any such agreement whenever it determines that the agreement no longer serves the interest of effective enforcement of this subchapter.

(c) Every employer, employment agency, and labor organization subject to this subchapter shall (1) make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed, (2) preserve such records for such periods, and (3) make such reports therefrom as the Commission shall prescribe by regulation or order, after public hearing, as reasonable, necessary, or appropriate for the enforcement of this subchapter or the regulations or orders thereunder. The Commission shall, by regulation, require each employer, labor organization, and joint labormanagement committee subject to this subchapter which controls an apprenticeship or other training program to maintain such records as are reasonably necessary to carry out the purposes of this subchapter, including, but not limited to, a list of

applicants who wish to participate in such program, including the chronological order in which applications were received, and to furnish to the Commission upon request, a detailed description of the manner in which persons are selected to participate in the apprenticeship or other training program. Any employer, employment agency, labor organization, or joint labormanagement committee which believes that the application to it of any regulation or order issued under this section would result in undue hardship may apply to the Commission for an exemption from the application of such regulation or order, and, if such application for an exemption is denied, bring a civil action in the United States district court for the district where such records are kept. If the Commission or the court, as the case may be, finds that the application of the regulation or order to the employer, employment agency, or labor organization in question would impose an undue hardship, the Commission or the court, as the case may be, may grant appropriate relief. If any person required to comply with the provisions of this subsection fails or refuses to do so, the United States district court for the district in which such person is found, resides, or transacts business, shall, upon application of the Commission, or the Attorney General in a case involving a government, governmental agency or political subdivision, have jurisdiction to issue to such person an order requiring him to comply.

(d) In prescribing requirements pursuant to subsection (c) of this section, the Commission shall consult with other interested State and Federal agencies and shall endeavor

to coordinate its requirements with those adopted by such agencies. The Commission shall furnish upon request and without cost to any State or local agency charged with the administration of a fair employment practice law information obtained pursuant to subsection (c) of this section from any employer, employment agency, labor organization, or joint labormanagement committee subject to the jurisdiction of such agency. Such information shall be furnished on condition that it not be made public by the recipient agency prior to the institution of a proceeding under State or local law involving such information. If this condition is violated by a recipient agency, the Commission may decline to honor subsequent requests pursuant to this subsection.

(e) It shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding under this subchapter involving such information. Any officer or employee of the Commission who shall make public in any manner whatever any information in violation of this subsection shall be guilty, of a misdemeanor and upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than one year.

INVESTIGATORY POWERS

SEC. 2000e-9. [Section 710]

For the purpose of all hearings and investigations conducted by the Commission or its duly authorized agents or agencies, section 161 of title 29 [section 11 of the National Labor Relations Act] shall apply.

POSTING OF NOTICES; PENALTIES

SEC. 2000e-10. [Section 711]

(a) Every employer, employment agency, and labor organization, as the case may be, shall post and keep posted in conspicuous places upon its premises where notices to employees, applicants for employment, and members are customarily posted a notice to be prepared or approved by the Commission setting forth excerpts, from or, summaries of, the pertinent provisions of this subchapter and information pertinent to the filing of a complaint.

(b) A willful violation of this section shall be punishable by a fine of not more than $100 for each separate offense.

VETERANS' SPECIAL RIGHTS OR PREFERENCE

SEC. 2000e-11. [Section 712]

Nothing contained in this subchapter shall be construed to repeal or modify any Federal, State, territorial, or local law creating special rights or preference for veterans.

RULES AND REGULATIONS

SEC. 2000e-12. [Section 713]

(a) The Commission shall have authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this subchapter. Regulations issued under this section shall be in conformity with the standards and limitations of subchapter II of chapter 5 of title 5 [the Administrative Procedure Act].

(b) In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission, or (2) the failure of such person to publish and file any information required by any provision of this subchapter if he pleads and proves that he failed to publish and file such information in good faith, in conformity with the instructions of the Commission issued under this subchapter regarding the filing of such information. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that (A) after such act or omission, such interpretation or opinion is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect, or (B) after publishing or filing the description and annual reports, such publication or filing is determined by judicial

authority not to be in conformity with the requirements of this subchapter.

FORCIBLY RESISTING THE COMMISSION OR ITS REPRESENTATIVES

SEC. 2000e-13. [Section 714]

The provisions of sections 111 and 1114, title 18 [United States Code], shall apply to officers, agents, and employees of the Commission in the performance of their official duties. Notwithstanding the provisions of sections 111 and 1114 of title 18 [United States Code], whoever in violation of the provisions of section 1114 of such title kills a person while engaged in or on account of the performance of his official functions under this Act shall be punished by imprisonment for any term of years or for life.

TRANSFER OF AUTHORITY

[Administration of the duties of the Equal Employment Opportunity
Coordinating Council was transferred to the Equal Employment Opportunity
Commission effective July 1, 1978, under the President's Reorganization
Plan of 1978.]

EQUAL EMPLOYMENT OPPORTUNITY COORDINATING COUNCIL

SEC. 2000e-14. [Section 715]

[There shall be established an Equal Employment Opportunity Coordinating Council (hereinafter referred to in this section as the Council) composed of the Secretary of Labor, the Chairman of the Equal Employment Opportunity Commission, the Attorney General, the Chairman of the United States Civil Service Commission, and the Chairman of the United States Civil Rights Commission, or their respective delegates.]

The Equal Employment Opportunity Commission [Council] shall have the responsibility for developing and implementing agreements, policies and practices designed to maximize effort, promote efficiency, and eliminate conflict, competition, duplication and inconsistency among the operations, functions and jurisdictions of the various departments, agencies and branches of the Federal Government responsible for the implementation and enforcement of equal employment opportunity legislation, orders, and policies. On or before October 1 [July 1] of each year, the Equal Employment Opportunity Commission [Council] shall transmit to the President and to the Congress a report of its activities, together with such recommendations for legislative or administrative changes as it concludes are desirable to further promote the purposes of this section.

EFFECTIVE DATE

SEC. 2000e-15. [Section 716]

[(a) This title shall become effective one year after the date of its enactment.

(b) Notwithstanding subsection (a), sections of this title other than sections 703, 704, 706, and 707 shall become effective immediately.

(c)] The President shall, as soon as feasible after July 2, 1964 [the enactment of this title], convene one or more conferences for the purpose of enabling the leaders of groups whose members will be affected by this subchapter to become familiar with the rights afforded and obligations imposed by its provisions, and for the purpose of making plans which will result in the fair and effective administration of this subchapter when all of its provisions become effective. The President shall invite the participation in such conference or conferences of (1) the members of the President's Committee on Equal Employment Opportunity, (2) the members of the Commission on Civil Rights, (3) representatives of State and local agencies engaged in furthering equal employment opportunity, (4) representatives of private agencies engaged in furthering equal employment opportunity, and (5) representatives of employers, labor organizations, and employment agencies who will be subject to this subchapter.

TRANSFER OF AUTHORITY

[Enforcement of Section 717 was transferred to the Equal Employment Opportunity Commission from the Civil Service Commission (Office of Personnel Management) effective January 1, 1979 under the President's Reorganization Plan No. 1 of 1978.]

EMPLOYMENT BY FEDERAL GOVERNMENT

SEC. 2000e-16. [Section 717]

(a) All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5 [United States Code], in executive agencies [other than the General Accounting Office] as defined in section 105 of title 5 [United States Code] (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

(b) Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission [Civil Service Commission] shall have authority to enforce the

provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Equal Employment Opportunity Commission [Civil Service Commission] shall-

(1) be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department and agency and each appropriate unit referred to in subsection (a) of this section shall submit in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment;

(2) be responsible for the review and evaluation of the operation of all agency equal employment opportunity programs, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each such department, agency, or unit; and

(3) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to equal employment opportunity.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions which shall include a provision that an employee or applicant for employment shall be notified of

any final action taken on any complaint of discrimination filed by him thereunder. The plan submitted by each department, agency, and unit shall include, but not be limited to-

(1) provision for the establishment of training and education programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest potential; and

(2) a description of the qualifications in terms of training and experience relating to equal employment opportunity for the principal and operating officials of each such department, agency, or unit responsible for carrying out the equal employment opportunity program and of the allocation of personnel and resources proposed by such department, agency, or unit to carry out its equal employment opportunity program.

With respect to employment in the Library of Congress, authorities granted in this subsection to the Equal Employment Opportunity Commission [Civil Service Commission] shall be exercised by the Librarian of Congress.

(c) Within 90 days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission [Civil Service Commission] upon an appeal from a decision or order of such department, agency, or unit on a complaint of

discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Equal Employment Opportunity Commission [Civil Service Commission] on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title [section 706], in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

(d) The provisions of section 2000e-5(f) through (k) of this title [section 706(f) through (k)], as applicable, shall govern civil actions brought hereunder, and the same interest to compensate for delay in payment shall be available as in cases involving nonpublic parties.

(e) Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government.

SPECIAL PROVISIONS WITH RESPECT TO DENIAL, TERMINATION, AND SUSPENSION OF GOVERNMENT CONTRACTS

SEC. 2000e-17. [Section 718]

No Government contract, or portion thereof, with any employer, shall be denied, withheld, terminated, or suspended, by any agency or officer of the United States under any equal employment opportunity law or order, where such employer has an affirmative action plan which has previously been accepted by the Government for the same facility within the past twelve months without first according such employer full hearing and adjudication under the provisions of section 554 of title 5 [United States Code], and the following pertinent sections: Provided, That if such employer has deviated substantially from such previously agreed to affirmative action plan, this section shall not apply: Provided further, That for the purposes of this section an affirmative action plan shall be deemed to have been accepted by the Government at the time the appropriate compliance agency has accepted such plan unless within fortyfive days thereafter the Office of Federal Contract Compliance has disapproved such plan.

Respectfully Resubmitted

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